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JUDICIAL CONTROL OF ADMINISTRATIVE AND LEGISLATIVE ACTS IN FRANCE

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In recent years there has been an interesting and very remarkable extension of judicial control over the acts of the administrative authorities in France. The doctrine of recourse in annulment for excess of power, in particular, has undergone such an extraordinary development that it is probably safe to say that there is now no other country where private rights are better protected against arbitrary and illegal acts of public officers. It is an interesting fact also that this protection has not been created by legislation but is mainly the work of the council of state, and, to a less degree, of the court of cassation, the two supreme judicial tribunals of France.

The solicitude which the council of state, especially, has shown for the protection of individual rights and the independence which it has exhibited as over against the government by whom the councillors of state are appointed and by whom they may be removed at pleasure is a sufficient answer to the criticism of those English and American writers who assert that the French administrative courts are the docile and servile instruments of the government, and that in controversies between the administration and private individuals their decisions are generally in favor

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of the administration. Scores of decisions might be cited in refutation of this view if the limits of this paper permitted. It is enough to say that few persons in France now entertain any such opinion regarding the subserviency of the council of state. On the contrary, it may be truthfully said that the council of state today enjoys a place in the public confidence, esteem and respect of the French people comparable only to that of the supreme court of the United States among Americans.[1] Thanks to its liberal jurisprudence[2] almost every unilateral act[3] of an administrative officer or authority, from the president of the republic down to the pettiest *garde champêtre* may today be judicially attacked and annulled for illegality.

The principal forms of judicial control may be grouped under two heads: first, the indirect control exercised by the judicial courts over illegal ordinances (*règlements*) of the administrative authorities; and, second, the direct control exercised by the council of state through its power to annul administrative acts for "excess of power," that is to say, acts which are *ultra vires*

[1] Laferrière (*Traité de la Juridiction Administrative*, 1888, vol. ii, p. 533,) justly remarks that "if any one may complain of the jurisprudence of the council of state it is not private individuals but the administration itself." If the council of state, he adds, had desired to favor the government at the expense of private individuals it could have done so by a strict interpretation of the laws of 1790 and 1872 from which its authority is derived; it could have denied recourse for excess of power for other reasons than incompetence; but it has not done this; on the contrary, it has constantly extended by interpretation the grounds of recourse to include violation of the law, vice of form and misuse of power; and, he might have added, it has constantly enlarged the number of persons to whom recourse is allowed.

[2] I use the word "jurisprudence" throughout this article not in the English and American sense of the word but as descriptive of the body of judicial precedent or case law.

[3] For historical and juridical reasons which cannot be explained here "acts of management" (*actes de gestion*) which are largely contractual in character, are not open to recourse for excess of power. Only "acts of authority," i.e., acts of command or injunction, acts which are not assimilable to those of private individuals may be attacked and annulled for excess of power. For a discussion of the distinction and the reasons therefor, see Jèze in the *Revue du Droit Public*, vol. 22, p. 105 and vol. 25, pp. 671 ff; Hauriou, *La Gestion Administrative*, p. 33 and Marie, "de L'Avenir du Recours pour Excès de Pouvoir" in the *Rev. du Droit Public*, vol. 16, pp. 265 ff and 475 ff.

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for various reasons to be described hereafter. The control exercised by the judicial courts over illegal ordinances is based on what the French call the "exception of illegality," that is, the right of the individual who is prosecuted for violation of an ordinance which he believes to be illegal to plead the fact of illegality in bar of the imposition of the penalty which the law prescribes. During the *ancien régime* and for some time after the Revolution this plea was not admitted. During the early years of the First Empire the juducial courts were, to a large degree, the servile instruments of Napoleon and refused to admit the plea of illegality against all acts of the administrative authorities.[4]

Thus in 1807 the court of cassation held that the inferior courts had no power to refuse to apply police ordinances on the ground of their illegality. For a stronger reason ordinances issued by prefects and, of course, those emanating from the emperor were exempt from judicial control.[5] But before the fall of Napoleon the supreme court changed its attitude and in 1807 it quashed fourteen decisions of a police court at La Rochelle which had condemned certain individuals for violation of an illegal municipal ordinance. Thus the rule was laid down that the courts were not bound to impose penalties for violation of an illegal municipal regulation and in the same year the same rule in regard to ordinances emanating from prefects was affirmed. During the period of the Restoration the judges exhibited more independence because of their life tenure and in consequence of the greater prestige of the judicial tribunals as compared with the council of state, which had incurred the royal hostility largely because of its imperial origin. The judicial courts, therefore, freely asserted the right to refuse to impose fines for the violation of administrative ordinances which they regarded as illegal and the court of cassation upheld the right. During the period of the July monarchy the exception of illegality became firmly established and in some cases the courts even refused to apply

[4] Nézard, *Le Contrôle Juridique des Règlements d' Administration Publique* p. 6.

[5] Ibid., pp. 6, 15.

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illegal ordinances emanating from the king.[6] It was during this period that the principle of the exception of illegality, which up to that time rested solely upon judicial precedent, was sanctioned by law. It is found in section 15 of article 471 of the penal code (as revised in 1832) which declares that "those found guilty of violating ordinances (*règlements*) *legally made* by the administrative authority shall be punished by a fine of from one to five francs." From that time until now the judicial tribunals have construed this provision as giving them the right to determine whether an ordinance for violation of which they are called upon to impose a fine, is within the legal competence of the authority from which it emanates and whether it is in conformity with the constitution and laws, and to refuse to impose the fine in case the contrary is found to be true.[7] This power is therefore an exception to the general principle embodied in the law of 1790, still in force, which forbids the judges under penalty of forfeiting their offices from interfering with the exercise of the executive or legislative power, and also to article 127 of the penal code which punishes with civil degradation judges who interfere (*s'immiscer*) in matters attributed to the administration.[8]

The second means of control is the power of the council of state to annul the acts of the administrative authorities for excess of power. This is a far more important form of control than the first mentioned; it constitutes the *pièce essentielle* of

[6] Thus in 1834 the court of Nîmes refused to apply a royal ordinance of 1822, on the ground that "it was a constitutional principle that an ordinance could not derogate from a law and that the ordinance in question was beyond the legal power of the executive as given by the chamber." The text of this decision may be found in Cahen's, *La Loi et le Règlement*, p. 376.

[7] It is not true as is sometimes claimed, however, that article 471, section 15 mentioned above has reference only to police ordinances. It applies to all ordinances and the power to refuse to apply those which are illegal belongs to all judges, correctional, civil and commercial. Compare Garraud, *Traité de Droit Pénal*, 2d ed., vol. i, p. 225 and Nézard, *Le Contrôle Juridictionnel*, p. 72.

[8] Laferrière, *Traité de la Juridiction Administrative*, vol. ii, p. 435 explains the right of the judges to refuse to apply *règlements* illegally made, as a right inherent in the power of the courts to administer criminal justice. For the same view see Garraud, *Droit Pénal*, vol. vi, p. 444. Hauriou (*Précis de Droit Administratif et de Droit Public*, 8th ed., p. 60), points out that this power serves as a "corrective" of French administrative law because the administration is here made accountable to the judicial rather than to the administrative courts.

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French administrative law.[9] It rests almost entirely upon the jurisprudence of the council of state (and to a limited extent upon that of the tribunal of conflicts). The legislature could, of course, have intervened and freed the administration from the control to which the council of state by its decisions has subjected it, but it has not done so; on the contrary, it has acquiesced in the continued extension of this control and in various legislative acts it has been sanctioned by allusion. From the standpoint of the individual it possesses certain advantages over the control exercised by the judicial courts through the "exception of illegality"[10] since he is not compelled to violate the act and submit to a prosecution in order to bring the question of its illegality before the court. Moreover, other persons than those directly injured by the act may attack it before the council of state. Finally, if the objectionable act is annulled by the council of state, the effect operates *erga omnes*, that is to say, all persons concerned benefit from the annulment, whereas the judicial court does not annul the act but simply refuses to impose the fine prescribed for its violation.

The power of the council of state in an action of annulment for excess of power is strictly limited, however, to pronouncing the nullity of the act and it can do this only for excess of power. It cannot annul for expediency or other reasons; it cannot in a proceeding for annulment consider questions of fact;[11] nor mod-

[9] Jèze, *Principes Généraux du Droit Administratif*, p. 89; compare also Hauriou, pp. 434 et seq.

[10] On the whole question of the power of the judicial courts in respect to illegal ordinances see Nézard, *Le Contrôle Juridictionnel des Règlements d' Administration Publique* (1910), pp. 6–7; 15–16; Cahen, *La Loi et le Règlement*, p. 376; Moreau, *Le Règlement administratif*, p. 261; Laferrière, Op. cit., bk. vi; Hauriou, p. 60; Duquesnel, *Le Jurisprudence comparée du Conseil d' Etat et de la Cour. de Cassation*, pp. 9 ff. and 137 ff.

[11] M. Jèze, however, holds the contrary view and he quotes the opinion of M. Romieu, a distinguished member of the council of state, in the *Durand* case (1906) in favor of the view that in certain cases the council of state may pass upon questions of fact in proceedings for annulment. See his note in the *Revue du Droit Public*, vol. 28, p. 290. It would be a great advantage to suitors if when the council of state annuls an ordinance it could by the same decision award damages or furnish other redress without requiring the petitioner to bring a new action in the form of *recours contentieux*. M. Jèze advocates this change, *Principes Généraux*, p. 96.

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ify or reform the act complained of, nor decree restitution, nor condemn the administration to pecuniary damages or otherwise redress the injuries which the individual may have sustained.[12]

Recourse in annulment for excess of power is an extraordinary remedy and ordinarily it is not open to the individual until he has exhausted every other remedy before the administrative and judicial courts. This is the theory of "parallel recourse" developed by the council of state for the purpose of preventing it from being swamped by a multiplicity of vexatious and unfounded actions and at the same time to avoid the appearance of usurping the jurisdiction of other courts. Thus a taxpayer can not by this procedure attack the act of a municipal council levying a communal tax, because the law has provided another remedy, namely recourse before the judicial tribunals. The general rule is that if the individual may get satisfaction through any other tribunal or even through an ordinary action before the council of state, this tribunal will not permit him to attack the act by a proceeding in annulment for excess of power.[13]

A very interesting evolution of the jurisprudence of the council of state has been the gradual relaxation of the old requirements in regard to the interest required of the individual to be

[12] This can be done by the council of state only by another proceeding known as ordinary contentious recourse or *recours contentieux de pleine juridiction*, as it is sometimes called. The council of state will refuse to entertain an action in annulment for excess of power when the result will have the direct effect of condemning the administration to indemnify the injured party or to compel it to do something in his behalf. Ordinarily it will say in substance to him "the purpose of recourse in annulment for excess of power is only to secure the nullification of the act; if you desire an indemnity or other reparation for wrongs suffered, another remedy is open to you, namely, the ordinary *recours contentieux* and you must use it." But the rigor of this doctrine affirmed as recently as 1911 in the *Desplogues* case seems to have been relaxed if not abandoned in 1912 in the *Lafage* case where the council of state admitted an action in annulment against the decision of a minister refusing an allocation to a military surgeon. It annulled the decision of the minister thereby indirectly condemning the state to allow the indemnity claimed. See note by M. Jèze in the *Revue du Droit Public*, vol. 29, pp. 266.

[13] Compare Laferrière, vol. ii, pp. 444 et seq., see also an article by Marie, "L'Avenir du Recours pour Excés de Pouvoir," in the *Revue du Droit Public*, vol. 14, pp. 27 ff.

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admitted to attack judicially administrative acts for excess of power. Originally, it was necessary that he be able to show that the act complained of had violated a legal right but this rule has been abandoned and it is now sufficient for him to show that he possesses merely an interest in having the act annulled and this interest need not be direct and material but simply moral, that is to say, the interest which any citizen would have in seeing the act nullified.[14] Thus it has been held that an innkeeper whose inn fronts on a public square has sufficient interest to attack the order of a mayor forbidding the holding of a public fair on the square. Although the order injures no legal right of his he is interested in having the fair continued because of the increased business it brings to him by reason of the crowds it attracts to the vicinity of his hotel. He may, therefore, attack the act before the council of state and have it annulled in case it is *ultra vires*.[15] So an association of functionaries may attack an appointment, promotion, or dismissal of a public officer if the act is in violation of the ministerial ordinance governing appointments and removals and if the effect is to prejudice the promotion of any functionary belonging to the association. Any taxpayer may likewise attack an appropriation of money by a municipal council, or any other municipal act the effect of which is to increase his taxes, or to waste the funds or other property of the municipality. So any property owner has sufficient interest to enable him to attack a prefectoral order allowing an electric tramway company to stretch overhead wires on the public streets.[16]

The result of the relaxation by the council of state of the rigor of the old rule regarding the degree of interest required is, that today almost any citizen may knock at its doors and obtain the

[14] But it should be observed that it is not to satisfy his interest that recourse in annulation is allowed; it is to force the administration to observe and respect the law. Cf Berthélemy, *Droit Administratif*, 6th ed., p. 930.

[15] In order to avail of the *recours contentieux*, with a view to obtaining reparation for injuries he must, however, be able to show the violation of a *right;* mere interest is not sufficient as it is in the case of recourse in annulment.

[16] See the *Storch* case, 1905, analyzed by M. Jèze in the *Revue du Droit Public*, vol. 22, pp. 346 et seq.

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annulment of an illegal administrative act.[17] The extent to which this privilege is availed of in practice is apparent from the crowded dockets of the council of state and the large number of decisions which it renders. The proceeding in annulment is simple, expeditious and inexpensive. The complaint is required to be filed on stamped paper (the cost of the stamp is 12 cents); there is now no *enregistrement* tax (unless the petitioner loses his suit in which case he is assessed $20 in costs), and since 1864 the services of an attorney have not been obligatory. With an expenditure of only twelve sous, therefore, the citizen may take his case to the supreme administrative court and have an illegal act of the administration declared null and void.

The grounds upon which the acts of the administrative authorities may be annulled, like the number of persons allowed to bring actions in recourse for excess of power, have been gradually multiplied as the council of state has become more and more inspired with liberal democratic ideas. Originally, annulment was pronounced only for incompetence and vice of form on the part of the author of the act attacked; then during the period of the July monarchy violation of the law was admitted as a ground for annulment, and, finally, after 1872, misuse or abuse of power (*détournement de pouvoir*) was recognized to be a sufficient ground for nullification. Most of the writers on administrative law today enumerate these as the only grounds upon which the council of state will nullify the acts of the administrative authorities.[18]

[17] The jurisprudence relating to the extension of the doctrine of interest is of very recent origin. In fact it first appeared in the *Casonova* case (1901) where a taxpayer was admitted to attack an ordinance of a municipal council appropriating 2000 francs for the support of a town physician. Since that date there has been an almost steady stream of decisions extending the right of recourse to new categories of persons. For a review of the more recent decisions see M. Jèze's note in the *Revue du Droit Public*, vol. 22, pp. 346 et seq; vol. 23, pp. 254 et seq., also his *Principes Généraux du Droit Administratif*, pp. 217 ff. Compare also Laferrière, vol. ii, p. 409; Hanriou, p. 464; Berthélemy, *Droit Administratif*, p. 931 and Moreau, *Le Règlement Administratif*, p. 300.

[18] Compare Hauriou, p. 437 and Laferrière, vol. ii, pp. 468 ff. M Jèze criticizes this classification as unscientific and inaccurate. Thus incompetence and violation of the law overlap and there are other grounds of recourse, he says, than those mentioned above. See his notes in the *Revue du Droit Public*, vol. 25, p. 682 and vol. 28, pp. 286 ff.

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Incompetence may be due to usurpation; for example, a mayor issues an ordinance which only a prefect is competent to issue, or it may result from encroachment upon private interests, as where a municipal council establishes a system of municipal ownership or supports a town physician.[19] Vice of form results from the failure of the officer to observe the formalities required by the law, as where he fails to give the notice prescribed or where an "ordinance of public administration" issued by the president, fails to contain the visa, *le conseil d'état entendu*. Violation of the law results where the act is in contravention of the letter of the constitution, the statutes or the ordinances in force.[20] Misuse of power (*détournement du pouvior*), which represents the latest development of the jurisprudence of recourse, consists in the violation of the spirit of the law, that is to say, the exercise of power for another purpose than that which the law has conferred it. The reports of the council of state are full of cases of this kind. Prefects and mayors, who have a large police power, frequently issue *règlements* ostensibly in the interest of the public

[19] Hauriou, p. 456. Even the refusal of an officer to act when the law requires him to do so (e.g., where a mayor required to deliver a property alignment or a subprefect declines to issue a hunting permit, when the applicant is entitled to it) is construed as an act tainted with incompetence and its nullity will be pronounced.

[20] It is important to emphasize the fact here that the council of state annuls the acts of administrative authorities in violation of their own ordinances as readily as it annuls acts in violation of the statutes. A minister is, of course, free at any time to modify or revoke an ordinance but so long as it remains in force the council of state will insist that it be strictly observed. Thus acts appointing, promoting or removing public officers in violation of the ordinances relating to the civil service (and in France almost the whole law governing such matters is regulated by ministerial ordinances rather than by acts of the legislature), may be nullified and in fact are frequently nullified, by the council of state. The protection against favoritism and other forms of arbitrary action on the part of ministers which the council of state has thus created has gone far toward securing for the functionaries those guarantees which they have long demanded but which the legislature has refused to give them. The solicitude of the council of state for their rights and the frequency with which it has annulled arbitrary appointments, promotions and removals has done much to increase the respect and esteem in which it is held not only by the great body of functionaries but by the masses of the French people.

For a review of some recent important decisions on these points see M. Jèze in the *Revue du Droit Public*, vol. 23, pp. 265 ff.

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health or safety when the real purpose is the financial interest of the commune, or some private or political interest.[21] It is now well settled, however, that the acts of administrative authorities to be legal must not only be in conformity with the letter of the law but must be in harmony with its spirit and purpose.

A classic case of the kind, the first in which the doctrine of *détournement de pouvior* was enunciated, arose in 1864 when the prefect of the department of the Marne-et-Seine, under the pretext of his police power, granted to the owner of an omnibus line the exclusive privilege of meeting the trains at the railroad station at Fontainebleau. The council of state declared the act null and void on the ground that it was not a police measure but one the effect of which was to establish a private monopoly and as such was a misuse of power. Another famous case arose in 1872 involving the legality of a prefectoral ordinance forbidding the owner of a mineral spring from selling the waters therefrom. The ordinance was issued as a health measure but in fact the hygienic properties of the water had been established by chemical analysis. The council of state held that the ordinance was issued with another end in view than that which the law contemplated and was therefore null and void.[22]

A still more famous case arose in 1879. The state had established a government monoply of the manufacture of matches and in order to avoid the expense of expropriating unauthorized private manufacturers, a prefect acting under the order of the minister of the interior proceeded to close their establishments upon police grounds. The council of state not only pronounced the order null and void but condemned the state to pay damages to the private manufacturers. In this connection it may be interesting to observe that the private manufacturers had sought relief in the judicial courts but the court of cassation sustained the legality of the ministerial order. Thereupon they attacked the order before the council of state by an action in annulment for excess of power and that body sustained their contention. We have here one of many cases in which private rights have

[21] Compare Laferrière, vol. ii, pp. 453 ff and 521 ff.
[22] Laferrière, vol. ii, p. 531.

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found a guardian in the supreme administrative court when the supreme judicial court had upheld the claims of the government.

As has been said, the judicial courts during the period of the Restoration asserted and exercised the right to refuse to impose fines for the violation of all illegal ordinances, even those issued by the crown. But the administrative courts, in the beginning, declined to follow the example of the judicial tribunals, and, while they did not hesitate to allow recourse for excess of power against the ordinances issued by mayors and prefects they refused to allow it against those emanating from the king. The council of state, as has been pointed out, was in bad repute because of its imperial origin and subserviency to the emperor and several attempts were even made to abolish it. The government of the restoration would in all probability have refused to tolerate the exercise of control over royal ordinances although it acquiesced in the exercise of such control by the judicial courts, and it did not interpose objection to annulment by the council of state of illegal ordinances of other administrative authorities than the king.[23] With the advent of the July monarchy, however, and the loss by the crown of its preponderant political rôle, a new theory regarding the immunity of the royal acts from judicial control was developed and in 1845 the council of state asserted and exercised, for the first time, the right to entertain jurisdiction of actions for the annulment of certain ordinances emanating from the king, for reasons of incompetence and vice of form, but not yet for violation of law or misuse of power. At that time and until very recently, however, the council of state made a distinction between simple ordinances emanating from the chief of state, and "ordinances of public administration" (*règlements d administration publique*) the latter of which, but not the former, were required to be submitted to the council of state for its advice. Against the former class of ordinances the council of state admitted recourse for excess of power but it was

[23] Compare Nézard, *Le Contrôle Juridictionnel*, p. 17; Jèze, *Principes Généraux du Droit Administratif*, p. 217; Moreau, *Le Règlement Administratif*, p. 284; and Cormenin, *Questions du Droit Administratif*, p. 64.

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refused against the latter.[24] It has long been a practice of the French parliament to delegate very extensive legislative power to the chief of state. It frequently authorizes him to regulate by decree important matters which in the United States belong entirely to the domain of statutory legislation. It is also a common French practice to embody in the acts of parliament only general principles and to delegate to the executive the power to complete the details of the statute by an "ordinance of public administration."[25] The council of state has always regarded such ordinances as a form of delegated legislation and therefore assimilable to acts of parliament. As such they were until very recently held to be exempt from judicial control through actions in annulment for excess of power, exactly as if they were enacted directly by the legislature. If illegal, the judicial courts might refuse to impose fines for their violation but neither they nor the council of state could annul them. As late as 1895 in the *Montreuil* case the council of state refused to entertain jurisdiction of an action in annulment brought by a commune against a decree fixing an indemnity of residence allowed by law to teachers of primary schools, on the ground that

[24] Most of the French jurists recognize two forms of *règlements* of public administration: first, those issued by the chief of state as a result of his constitutional power to oversee and assure the execution of the laws; second, those issued by him in pursuance of delegation by the legislature, as where he is charged by the legislature with regulating by decree some matter with which the law does not deal or where it charges him with completing the details of a law. Both types of *règlements*, however, are required to be submitted to the council of state.

[25] There has been much discussion in France as to whether such ordinances are the result of legislative delegation. The theory of delegation was sustained by most of the older writers like Rossi, Foucart, Aucoc, St. Girons, DuCrocq and Batbie. Most of the present day authorities, however, maintain the contrary view and hold to the principle that legislative power cannot be delegated. Such is the view of Esmein ("de la delegation du Pouvoir Legislatif," *Rev. Pol. et Parl.*, vol. i, p. 209); Berthélemy, *Droit Administratif*, p. 90; Jèze, *Principes Généraux*, p. 221; Nézard, Op. cit., p. 33; and Hanriou, *Droit ad ministratif*, p. 150. Among contemporary authorities, however, who maintain the theory of delegation are Moreau, (*Le Règlement Administratif*, p. 180) and Cahen (*La Loi et le Règlement*, pp. 232 ff.

The decision of the council of state in 1907 admitting recourse for excess of power against this class of ordinances leaves the question one of academic interest only.

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the decree was issued by the executive in pursuance of authority delegated by the legislature. But already there were signs of a tendency toward a relaxation of this rule. The council of state had in 1888 asserted the right to determine whether such an ordinance, in a particular case, was regular in form; then it went a step further and asserted the right to determine whether it was regular in substance (*au fond*), that is to say, whether the president in issuing the ordinance had acted within his legal competence.[26] It may also be remarked that the council of state had all along allowed recourse against ordinances issued by mayors in pursuance of authority delegated by parliament. Moreover, the council of state had attenuated the rigor of the old rule by allowing recourse against specific acts in execution of such ordinances. This solution of the problem was quite illogical and was criticized by many of the highest authorities.[27] Why, it was asked, should the council of state refuse to admit an ordinance to be judicially attacked for excess of power when the individual measures by which the ordinance was executed were open to attack and annulment? Finally, in 1907 the council of state seized a favorable occasion to adopt the solution which the best juristic thought of France had long demanded and toward which its own decisions had been tending for some years. In 1901 the president had issued an ordinance of public administration in pursuance of an act of parliament of 1842, under which the state had entered into certain agreements with the railroad companies. The ordinance of 1901 undertook to modify the terms of these agreements by imposing upon the companies new and heavy burdens in respect to the maintenance and operation of their lines. The companies attacked the ordinance on the ground of excess of power. The minister of public works

[26] Jèze, *Revue du Droit Public*, vol. 25, p. 42. The court of accounts (1897) and the court of cassation (1900, 1905) asserted and exercised a similar control. The latter court held invalid a decree of the President issued in pursuance of a law of June 26, 1899, on the ground that he had "manifestly exceeded the powers which the said law delegated to the executive power—and thus encroached upon the domain reserved to the legislative power." See also the note by M. Jèze in the *Rev. du Dr. Pub.*, vol. 23, p. 74.

[27] See Nézard, p. 21 and the authorities cited.

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appeared before the council and set up the old plea that ordinances emanating from the chief of state could not be made objects of recourse in annulment for excess of power. The council of state, however, entertained jurisdiction of the case and declared the ordinance null and void as being in excess of power. Thus the old distinction between simple presidential ordinances and ordinances of public administration was abandoned and the immunity from judicial control which the latter had always enjoyed was definitely abandoned after having been maintained for nearly a century.[28] The theory of legislative delegation which the council of state has always maintained was not, however, repudiated. It still holds that such ordinances are the result of delegation by the legislature, but henceforth they are not to be regarded as fully assimilable to statutes and like other ordinances they may be attacked and annulled for excess of power.[29]

This decision constitutes a notable landmark in a long and interesting evolution of the jurisprudence of the council of state in regard to recourse for excess of power. It marks a complete reversal of a line of decisions dating back almost to the origin of the theory of the doctrine of recourse and can only be explained by the increasing liberalism of the council of state and its desire to enlarge still further the protection of private rights against arbitrary and illegal acts of the executive. It was also another interesting exhibition of the independence of the council of state as over against the government. The case was one in which the government was vitally interested and it made a strong effort to induce the council of state to stand by its former decisions and refuse recourse against ordinances of public administration. The far-reaching effect of the decision can only be fully appreciated when we remember that a very considerable and important part of French legislation today is being enacted not by the legislature but by the president in the form of ordinances of public administration, issued in pursuance of legislative delegation. In

[28] This new theory has since been many times affirmed. See the cases cited by Jèze, *Principes Généraux*, p. 222, n. 2.

[29] For a discussion of this now famous case see Jèze in the *Revue du Droit Public*, vol. 25, pp. 51 ff and Nézard, *Le Contrôle Juridictionnel*, pp. 22 ff.

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recent years there has been an increasing tendency on the part of the legislature to abdicate its functions and to delegate its powers of legislation to the executive. Almost every important act of parliament today concludes with the familiar clause: "an ordinance of public administration shall determine the measures proper for assuring the execution of the present law.[30] In many cases these ordinances contain important general provisions imposing obligations upon the citizens as well as provisions affecting their rights of person and property.[31] In short, they are intrinsically if not in form veritable legislative acts and there have been many complaints that these ordinances in effect often modified if they did not violate the statutes in pursuance of which they were issued. So long as the council of state refused to allow recourse against them there was no way by which they could be attacked and nullified, and the individuals affected were without redress except that they could attack individually the specific measures in execution of the ordinance. In that case the council of state could annul the measure of execution but not the ordinance itself. It remained in effect and its enforcement could only be prevented by separate and distinct suits brought by each individual affected, against the particular act of execution.

While the council of state by its decision of 1907 abandoned the old distinction between simple presidential ordinances and ordinances of public administration and declared that the latter equally with the former were judicially attackable for excess of power there still remain two classes of presidential acts against

[30] Compare Nézard, Op. cit., p. 23. The following recent examples may be cited in illustration; the law of 1894 concerning cheap tenement houses was completed by an ordinance of public administration of September 21, 1895; the law on associations of 1901 was completed by two ordinances issued in August of the same year; the law of 1904 concerning congregations was completed by two ordinances issued in January and June, 1905; the great law of 1905 on the separation of church and state was completed by the promulgation of three different ordinances. Many others might be cited.

[31] See the examples cited in Nézard, pp. 27–31. Duguit (*Droit Const*, i, p. 195, holds that all *règlements* entail restrictions upon the rights of individuals in respect to their liberty or property and are therefore in effect material, if not formal laws.

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which the council of state refuses to allow recourse in annulment for excess of power. The first of these are the decrees, or decree-laws, as they are sometimes called, issued in pursuance of the *senatus consultum* of 1854,[32] which authorizes the president to regulate by decree colonial matters[33] in so far as they have not been regulated by acts of parliament. The law of 1872 which defines in general terms the jurisdiction of the council of state restricts its competence in respect to recourse for excess of power to acts of the "different administrative authorities." Now the council of state has uniformly held that the president when exercising the power of legislation in respect to the colonies acts not as an "administrative authority" but as a "political authority" and consequently his colonial decrees are not subject to attack for excess of power.[34] But having decided in 1907 that ordinances of public administration, which differ in no intrinsic respect from decrees for the government of the colonies (both being the result of legislative delegation) are the acts of the president as an "administrative authority," logic and consistency would seem to require that the council of state should now open its doors to recourse in annulment against colonial decrees, and it is predicted that this will shortly be done.[35]

The second class of acts emanating from the president, against which the council of state declines to admit recourse in annulment for excess of power, are the so-called *actes de gouvernement.* For a long time the administrative jurists of France have recognized a distinction between "administrative" acts and "political" or "governmental" acts; the council of state has approved the distinction and has refused to allow individuals to attack ju-

[32] This *senatus-consultus* of course lost its constitutional character with the downfall of the Second Empire but it still remains in force as a statute.

[33] Except in Martinique, Guadeloupe and Réunion.

[34] Compare Tessier, *de la Responsabilité de la Puissance Publique*, p. 18.

[35] Such is the view of Jèze, *Principes Généraux*, p. 216 and Nézard, *Le Contrôle juridictionnel*, p. 58. Even Laferrière, writing years before the decision of 1907, admitted that if the President should undertake to deal by decree with colonial matters, the regulation of which is reserved to Parliament, the council of state would be justified in treating such a decree as of no force (*Traité*, vol. ii, pp. 8, 9). Compare also Tessier, p. 18.

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dicially the latter class of acts for excess of power, because in the performance of such acts the president is not acting as an "administrative" authority. The theory of *actes de gouvernement* has occupied an important place in French administrative law and there is an extensive literature, mostly polemic, dealing with the subject, although the matter is now becoming less and less important because of the increasing disposition of the council of state to abandon the distinction between the two categories of acts. The controversy has raged not so much around the theory upon which the distinction is based as around the question as to where the line of demarcation between the two classes of acts shall be drawn. A present day writer of high standing thus distinguishes between the two: "To *govern*, is to oversee the functioning of the public authorities, to assure the execution of the laws, to carry on relations with foreign powers; to *administer*, is to assure the daily application of the laws and to watch over the relations of the citizens with the public authorities and the relations between the different administrative authorities."[36] Some of the older writers constructed their definitions of *actes de gouvernement* so broadly as practically to deprive the government of all judicial control. Thus Dufour[37] defined an "act of government" as one which "has for its purpose the defense of society against its enemies from within and without" and this view was held by the court of cassation in a number of cases during the periods of the Restoration, the July monarchy and the second empire. Vivien in 1849 stated the generally accepted theory when he declared that "in certain circumstances the measures taken by the government in view of a great public necessity, even though they violate private rights are withdrawn from the control of the courts, otherwise the action of the government would be paralyzed, to the great detriment of the public interest." As has been pointed out by a well known French jurist, there is no abuse of authority which could

[36] Tessier, Op. cit., p. 42. Laferrière, vol. ii, p. 31 and Aucoc, *Conférences*, vol. i, secs. 38, 39, make a somewhat similar distinction.

[37] *Droit Administratif*, vol. iv, p. 600.

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not be justified upon such a theory.[38] Other writers have included within the category of governmental acts, measures of protection against invasion, epidemics, floods, riots, insurrections, etc.[39] The whole theory is an arbitrary one; it is hardly consistent with the liberal and enlightened jurisprudence of the council of state and is condemned by some of the most distinguished jurists of France.[40]

There are certain acts of the president, however, which even those who condemn the theory admit to be beyond the control

[38] Brémond, "Des Actes de Gouvernement," in the *Revue du Droit Pubic*, vol. v, pp. 23–75. This article contains a very full and learned discussion of the whole subject. See also Courtois, *Théorie des Actes de Gouvernement* (1899). There is a valuable bibliography of the subject in Moreau, p. 77.

[39] See Laferrière, vol. ii, p. 39; Aucoc, vol. i, sec. 289; and Du Crocq, vol. i, sec. 64. Laferrière mentions also, "measures of sanitary police" (p. 41).

[40] For example by M. Jèze, *Principes Généraux*, p. 232; Berthélemy, *Droit Administratif*, 7th ed., pp. 101, 105; Brémond, article cited p. 23; Michoud, *Annales de l'Enseignement Supérieur de Grenoble*, vol. i, p. 82; Hauriou, *Droit administratif*, pp. 77 ff.. Professor Jèze remarks that the distinction between "governmental" and "administrative" acts is most regrettable and is contrary to the spirit of modern French positive law. "There should be no acts of government which are free from judicial control and against which no recourse is allowed when they are illegal. It places the government above the laws upon the pretext that it acts are political." Some writers apparently frightened at the possible consequences of the doctrine in the vague and arbitrary form in which they have stated it, have attempted to attenuate its rigor by laying down the rule that, while the courts may not *annul* such acts they may decline to *apply* them when illegal. Thus Dareste, *Justice Administrative*, p. 222 and Aucoc, *Conférences*, vol. i, sec. 289.

Laferrière (ii, 40) recognizes that while general measures of the government for the protection of the public safety are not attackable for excess of power the individual acts in execution of those measures are. Thus a declaration of a state of siege cannot be made the object of recourse for excess of power but the act of the military commander who orders the imprisonment of an individual or the seizure of his property in pursuance of the decree may be. If this is true, what does the distinction avail the government? What is gained by exempting a decree of siege from judicial interference if the acts by which the decree are carried into execution are attackable? The theory of Laferrière, however, is followed by the council of state and the tribunal of conflicts. They refuse to recognize the right of recourse against decrees proclaiming a state of siege but they allow actions for damages sustained on account of individual acts in execution of the decrees. Thus the council of state has allowed recourse against any act suppressing a newspaper in execution of a declaration of siege although it refused to allow the declaration itself to be attacked. Compare Brémond, Op. cit., p. 64.

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of the courts. Such are the acts performed by him in the exercise of his constitutional powers in relation to the legislature; the convocation of the electors, the fixing of the date of the elections; the summoning, adjourning and closing of the sessions of parliament, the dissolution of the chamber of deputies, etc. Exempt likewise are his acts in respect to the conduct of foreign relations, such as the conclusion and execution of treaties. There are, however, signs of a disposition to admit recourse against illegal acts of diplomatic and consular representatives. Thus it has recently been held that an act performed by a diplomatic agent is not necessarily diplomatic and therefore immune from judicial attack since the act may be performed by him in his capacity as a judge, an arbiter, notary or officer of the civil state, as for example, when he performs a marriage ceremony.[41] The danger to which the citizen is exposed from the illegal acts of the government in respect to international relations is not great but as regards acts in the alleged interest of the public safety the possibility of abuse is very considerable. Happily the number of "governmental" acts of this kind against which recourse is refused as has been greatly reduced by the decisions of the council of state, and the tribunal of conflicts. But formerly the number was very large and both the administrative and judicial courts exhibited a deplorable subserviency toward the government. This was especially true during the period of

[41] Jèze, *Principes Généraux*, p. 236. A recent interesting case of the kind arose from the refusal of the French minister to Hayti to celebrate a marriage between two French subjects residing in that country, although there were no legal impediments to their marrying and there was no question as to the legal right of the minister to perform the ceremony. The parties thereupon returned to France and were married. The husband then brought an action for damages against the minister before the civil tribunal at Paris. The minister of foreign affairs induced the prefect to raise the question of conflict but the tribunal of conflicts affirmed the jurisdiction of the civil tribunal and ruled that all acts performed by a diplomatic representative in his character as an officer of the civil state were subject to judicial control. See the interesting comment on this case by M. Jèze in the *Revue du Droit Public*, vol. 28 (1911), pp. 666 ff. But compare the cases of *Bachatori*, *Vaudelet*, *Rasat*, and *Faraut* in which the council of state held that certain acts of a purely diplomatic character were exempt from judicial control. This doctrine is criticised by Jèze (in the *Rev. du Droit Pub.*, vol. 21, p. 83).

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the second empire when the independence of the council of state was far less than now. Thus in 1857 it refused to allow recourse against an imperial decree of 1854 forbidding the distillation of cereals—a measure designed to meet a threatened famine. The council of state rejected the petition on the ground that the decree was "a measure of government taken in the general interest and public safety."[42] So with regard to measures adopted by the government against members of dethroned dynasties, the council of state refused to interfere. Thus a decree of 1852 confiscating certain lands given by Louis Philippe in 1830 to his children was held to be a political or governmental act which the council of state would not permit to be attacked for excess of power. Likewise, a decree of the minister of the interior ordering the seizure of the manuscript of a *History of the Princes of Condé*, then in the possession of the Duc d'Aumale was held by the council of state in 1867 to be a political act and therefore not a subject for recourse in annulment.[43]

But since the establishment of the third republic the council of state and the tribunal of conflicts have shown more independence and they have not hesitated to allow recourse for excess of power against many acts which had formerly escaped judicial control because of their so-called "governmental" or "political" character. Thus in 1875 the council of state took jurisdiction of an action in annulment for excess of power brought by Jerome Napoleon whose name had been stricken from the army registers by order of the minister of war. It did likewise in 1887 in the cases of the Princes of Orleans and Prince Murat who had been similarly treated, and jurisdiction was taken notwithstanding the fact that the action of the government had been approved

[42] Brémond, Op. cit., pp. 63–64.

[43] Ibid., p. 65. Laferrière, (ii, 37) admits that "this jurisprudence went too far" in attaching too much importance to the intentions of the government and to *politiques mobiles*. Until the downfall of the Second Empire the so-called *mobile* theory was applied by the courts in dealing with these cases, that is to say, the test of whether an act was "governmental" was made to depend upon the circumstances of the moment and the motives of the government rather than upon the nature of the act. See the comments of Hauriou, p. 78; Laferrière, vol. ii, p. 31, and Berthélemy, p. 99.

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by an order of the day adopted by parliament. The order of the minister in respect to Prince Murat was annulled for false application of the law.[44] In 1880 the tribunal of conflicts held that the decrees of the government directed against the religious congregations were not "acts of government" but administrative acts and this also, notwithstanding the fact that they had been approved by parliament. Again in 1889 the tribunal of conflicts rejected the plea of "governmental acts" in the case of the seizure by a prefect under the order of the minister of the interior of the papers of the Count of Paris. Finally, in 1902 the tribunal of conflicts repudiated once more the old theory of "acts of high police or acts of government.[45] So with regard to the expulsion of foreigners the council of state holds that such acts are not political in the sense that they are exempt from judicial attack for illegality.

Thus, thanks to the liberal jurisprudence of the council of state, the old theory of the immunity of "governmental' acts has nearly disappeared. Individual liberty is hardly exposed to serious danger from the little that remains of it. The plea of public safety in defense of acts in violation of the law and of private rights is no longer entertained either by the council of state or the court of cassation. The few acts which remain free from judicial control relate for the most part to international relations and the maintenance of a state of martial law, and even as to these the discretion of the government is now considerably limited.

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Such is the control exercised today by the administrative and judicial courts over the acts of the administrative authorities. When we turn to acts of the legislature we find an almost entire absence of both executive and judicial control.

A distinguished French writer thus describes the legal omnipotence of parliament: "The powers of parliament in our public law, being without limits, the laws which it enacts are not sus-

[44] Laferrière, vol. ii, p. 38.

[45] This was the case of the prefect of the Rhone against the *Société Immobiliére de St. Just.* See the note by Jèze in the *Revue du Droit Public*, 1911, p. 63.

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ceptible, when they have been regularly promulgated, of any sort of recourse, even for violation of law."[46] This is the view of the great majority of French jurists.[47] Every act of parliament duly promulgated must therefore be applied by the courts whatever may be their opinion regarding its unconstitutionality.[48]

The question of unconstitutionality was raised for the first time during the July monarchy. In October, 1830, parliament passed a press law which was clearly contrary to article 69 of the charter. M. Cremieux, an eminent jurist, made a strong plea before the court of cassation in which he affirmed the right of the court to refuse to apply the law because of its manifest unconstitutionality and he pointed out that if the legislature could modify or abrogate with impunity any provision of the constitution it followed that there could be no constitution in the true sense of the word.[49] But after ten hours' deliberation the court of cassation decided that it had no power to declare the law unconstitutional; on the contrary the courts were bound to apply every law duly enacted by the chambers and regularly promulgated by the chief of state. In the following year this opinion was reaffirmed by the court of cassation, and again in 1851, and this view has been followed without exception since

[46] Tessier, *De la Responsabilité de la Puissance Publique*, p. 15.

[47] Compare especially Esmein, *Droit Constitutionnel*, pp. 475, 501; Larnaude, *Bulletin de la Société de Législation Comparée*, 1902, p. 220; Nézard, *Théorie Juridique de la Puissance Publique*, p. 17; Laferrière, *Traité*, vol. i, p. 435; Duguit, *Droit Constitutionnel*, vol. i, pp. 158–159. "The Parliament," says Moreau (*La Règlement Administratif*, p. 293), "because it is elected by the nation is subject to no control other than that of the electors and of public opinion; its acts cannot be referred to a tribunal of any kind whatever; rightly or wrongly, it is believed in France at present that this is the price of its independence and that its independence is necessary to liberty and the public welfare."

[48] It may also be added that there is no indirect judicial control in the form of actions for damages on account of the unconstitutional exercise of legislative power. See Laferrière, vol. ii, p. 13. But Duguit (*Transformations du Droit Public*, pp. 85, 241) thinks there are signs of a tendency to recognize the responsibility of the State for injuries resulting from the operation of unconstitutional laws.

[49] The case is reported in Sirey's *Recueil* 33, 1, 357 (1833). See also the comments of M. Jèze in an article entitled, "Le Contrôle des Délibérations des assemblées Délibérantes," in the *Revue Générale de l'Administration*, 1895, p. 411.

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the establishment of the third republic.[50] The constitution of 1875 imposes few or no direct limitations on the legislative power and it contains no specific enumeration of the subjects upon which parliament may legislate. Its omnipotence is even more complete than that of the English parliament, for the French legislature is not limited by a body of custom and tradition such as operates in fact to restrict the legislative power in England. Unlike most of the earlier written constitutions of France, the constitution of 1875 contains no declaration of rights and of guarantees of individual liberty such as operate to limit the legislative power in the United States. It is true that some French writers affirm that the fundamental principles embodied in the earlier declarations are in fact a part of the public law of France today and as such are binding upon parliament quite as much as if they had been expressly reaffirmed in 1875 and that consequently the courts are not bound to apply acts of parliament in violation of those principles.[51] But the courts refuse to proceed on this theory and they have regularly applied acts which were clearly in violation of the declaration of rights of 1789.[52]

Many writers who deny the right of the French courts to declare acts of parliament null and void because of their material inconsistency with the constitution nevertheless admit that they may refuse to apply an act for reasons of formal invalidity. Thus if a law is not enacted by the two chambers in accordance with the constitutional prescriptions in regard to the exercise of the legislative power or if it is not regularly promulgated by the president of the republic the courts are not bound to apply it. In other words, while the courts may not control the material content of legislation they may control its extrinsic form[53] and

[50] Seignorel, "Le Contrôle du Pouvoir Legislatif," *Rev. Pol. et Parl.*, vol. 40 (1904), pp. 91–92; see also Larnaude, *Bul. de la Soc. de Lég. Comp.*, 1902, p. 219.

[51] For example, Duguit, *Droit Const.*, vol. ii, pp. 6, 13, and *Coumoul, Le Pouvoir Judiciaire*, p. 229. These writers affirm that the principles of 1789 had become so firmly established that it was unnecessary to reaffirm them in the constitution of 1875. But compare Esmein, *Droit Const.*, pp. 496 and 501, to the contrary.

[52] Cf. Duguit, *Droit Const.*, i, pp. 19, 20 and Seignorel, p. 538.

[53] Such is the view of M. Jèze, *Principes Généraux*, p. 212 (see also his note on the *Ronaux* case of 1903, *Rev. du Dr. Pub.*, 21: 117); Laurent, *Principes de Droit Civil*, vol. i, sec. 3; Duguit, *Droit Const.*, vol. i, p. 159; and apparently Larnaude, op. cit., p. 220.

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the court of cassation in the case of 1833 referred to above seems to have admitted this view.

Those who deny the right of the courts to declare acts of the legislature null and void because of their material invalidity rely, first of all, on the theory of the separation of legislative and judicial powers, proclaimed in 1789, and the express interdiction imposed on the judges by the law of 1790 from interfering with the acts of the legislature or suspending their execution.

Others[54] argue that an act of parliament is an emanation of the sovereign will, and cannot therefore be subjected to review, modified or nullified by any authority or organ of the government. This idea, which goes back to Rousseau[55] and which was affirmed in the declaration of rights of 1791, 1793 and 1795 has curiously enough persisted in France until this day. But such an argument, as many French writers have pointed out[56] is specious. They hold, and very properly, that an act of parliament is not an act of sovereignty; it is not necessarily an expression of the *volonté générale*— but is simply the will of a governmental organ, nothing more. Others argue that to allow the French courts such power would provoke conflicts between the legislative and judicial authorities and would put into the hands of the courts the power to obstruct legislative reforms—a power which was tyrannously exercised by the *parlements* of the *ancien régime* and the memory of which led the Revolutionists to deprive by positive law the judiciary of all control over legislation. Finally, it is argued that the conditions, which prevail in France, the habits and the temperament of the French people are so different from those of the United States that the argument from American experience cannot be regarded as decisive.[57] But there have always been able and distinguished advocates in

[54] Tessier, for example, op. cit., p. 15.

[55] *Contrat Sociale*, bk. ii, Ch. 6.

[56] Notably Jèze, *Principes Généraux*, p. 209; Duguit, *Transformations du Droit Public*, p. 85; and Cahen, *Le Loi et le Règlement*, p. 424.

[57] For example Larnaude, op. cit., pp. 225, 227 and Seignorel ("Le Contrôle du Pouvoir Legislatif," *Rev. Pol. et Parl.*, 1904, p. 534). "With our ideas in respect to popular sovereignty," says Seignorel, "we can never permit a single assembly composed of eight or ten judges to hold in check the will of the legis-

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France of the American doctrine and the number has steadily increased in recent years.[58] In the national assembly which framed the present constitution, Louis Blanc, speaking on the subject in the session of March 11, 1873, said: "I say finally that in order to hold in check the despotism of a single assembly the better means would be that which would result from giving to the judiciary the right to annul unconstitutional laws.[59] In the same assembly M. Naquet advocated the creation of a supreme court on the American model with similar powers in respect to unconstitutional legislation[60] and in 1894 while a member of parliament, he proposed an amendment to the constitution with this object in view.

The question has in recent years provoked widespread discussion and the American doctrine has been defended by many jurists, notably by Professor Beauregard of the Paris law faculty and a member of parliament,[61] by Charles Benoist, a veteran member of the chamber of deputies, and a distinguished scholar, well known for his tireless championship of proportional representation;[62] by Judge Coumoul of Toulouse,[63] Professors Duguit,[64]

lature, i.e., the will of the nation itself." "Moreover," he adds, "it is perilous to borrow from a foreign country an institution which would not be suitable to our customs, our national temperament or to our political organization." Compare also Boutmy, *Elements d'une Psychologie Politique du Peuple Américaine*, p. 256.

[58] Faustin Hélie one of the great jurists of the July monarchy was apparently such an advocate, for he says: "The application of the laws is the end of justice; but this application necessarily requires that the judge shall determine whether the acts invoked before him are law and what is their meaning. The tribunal of police cannot do other than exercise in regard to ordinances the right that all tribunals exercise in regard to the laws; they verify their legality and interpret them." *Traité de l'Instruction Criminelle*, vol. vi, p. 182.

[59] *Journal Officiel*, Mar. 12, 1873, p. 1707.

[60] See his *La Republique Radicale* (1873), Ch. xi.

[61] See his article in the *Monde Economique*, vol. ii, p. 411 (1894).

[62] See his article in the *Revue de Deux Mondes*, July 15, 1902; also his *Reforme Parlementaire*, Chap. on "La Cour Suprême." In 1903 M. Benoist introduced in the chamber of deputies a proposition to incorporate the declaration of rights into the constitution and to give the Court of Cassation power to annul all legislative acts in violation of the provisions of the declaration (*Journal Officiel*, Ch. des Deps., Apr. 29, 1903).

[63] *Traité du Pouvoir Judiciaire*, pp. 224.

[64] *Transformations du Droit Public*, pp. 97 ff.

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Cahen,[65] Moreau,[66] Hauriou,[67] Jèze,[68] Saleilles,[69] Thaller[70] and Jalabert;[71] and by M. Picot,[72] M. Devin[73] and others less well known.

In regard to the argument based on the principle of the separation of powers they point out that the law of 1790 forbidding the judges to interfere with the execution of the laws was designed to meet a situation that no longer exists. The judges at that time were suspected of being out of sympathy with, if not actually hostile to, the reforms inaugurated by the Revolutionists and it was feared that they would stand in the way of the realization of those reforms just as the old *parlements* had blocked the measures of Turgot, Necker and Malesherbes. The law of 1790 was therefore an exceptional measure intended to break the opposition of the judiciary to the new order of things. But the danger from a hostile judiciary in France has long since passed, and the judges today are neither opposed to the republic nor to the reforms advocated by Republicans.[74]

A court which refuses to apply an unconstitutional law, says Duguit, does not interfere in the exercise of the legislative power nor suspend the execution of a law; it merely refuses to apply what purports to be a law but which in fact is no law; to compel the courts to apply such a law is to force them to violate the con-

[65] *La Loi et le Règlement*, pp. 377 ff.

[66] *Le Règlement Administratif*, p. 261.

[67] *Droit Administratif et de Droit Public*, 8th ed., p. 39.

[68] *Principes Généraux*, pp. 208, 224; "Contrôle des Délibérations des assemblées Délibérantes" in the *Rev. Gen. d'Admin.*, 1895, pp. 401–415. See also his brief (in colloboration with M. Bethelémy) in a case before the supreme court of Roumania, in the *Revue du Droit Public*, vol. 29, pp. 139–156. Largely on the strength of their argument the court in 1912 declared unconstitutional a Roumanian statute. See the decision in the *Rev. du Droit Pub.*, vol. 29, pp. 365–368.

[69] *Bulletin de la Société de Lég. Comp.*, 1902, pp. 240–246.

[70] Ibid., p. 249.

[71] Ibid., p. 253.

[72] Same bulletin for the year 1900, p. 75; also his *La Réforme Judiciaire*, pp. 217–219.

[73] *La Loi*, Nov. 26, 1896. The arguments of MM. Jèze, Coumoul and Cahen in favor of the right of the courts to disregard unconstitutional legislative acts are especially full and convincing.

[74] This fact is especially emphasized by Jèze, Duguit, Cahen and Coumoul.

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stitution and the effect is to reduce them to a position of dependence upon the legislature, which is itself a violation of the principle of the separation of powers.[75]

Again it is pointed out that the courts have power to refuse to apply illegal ordinances; that there is no essential difference between the right of the judge in the two cases; if therefore, the exercise of the power in one case is a violation of the principle of the separation of powers it must be equally so in the other case. Ordinances of public administration according to the jurisprudence of the council of state are a form of delegated legislation and, as has been shown above, this legislation is often general and important in character. Yet no one asserts that it is a violation of the principle of the separation of powers to allow the courts to control this species of legislation.[76] Furthermore, the French jurists generally admit that the courts may refuse to apply an act of parliament which is formally invalid, that is, one which has not been enacted and promulgated in accordance with the formalities of procedure prescribed by the constitution.[77] Now the distinction between formal and material invalidity has no sound juridical basis. Constitutional injunctions and prohibitions are all of the same force; there is, therefore, no essential difference between the violation by the legislature of a constitutional rule of procedure and the violation of a substantive provision. If the courts may hold the legislature to the observance of the one class of constitutional provisions why should it be denied the right to compel observance of the

[75] *Transformations du Droit Public*, p. 97. For a similar line of argument see Coumoul, Ch. 6. Coumoul concludes his defense of the right of the courts to declare unconstitutional laws null and void as follows: "In reality therefore there are neither obstacles of law nor fact which prevent the judiciary from fulfilling its natural rôle in its relations with the legislative power—a rôle imposed by juridical logic, by the results of established principles and even by the force of things. The only reason for its inaction is its organic feebleness, its subordinate position, and, one may say, its inexistence as a great authority of the State" (p. 231).

[76] The argument from the analogy of judicial control of ordinances is developed at length by Cahen, pp. 383, 423.

[77] This opinion is held by Laferrière, *Traité*, vol. ii, p. 9; and by Larnaude, op. cit., pp. 220–221.

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other? Finally, and this is the most important argument, if the legislature may modify or abrogate a provision of the constitution at will subject to no restriction, the constitution, as Cremieux pointed out in his plea before the court of cassation in 1833, is an illusion; it can have no real existence except in so far as the legislature may choose to respect its provisions.

Such is the legal fact. Whether the courts will ever assume to exercise the power which many French jurists now maintain that they already have a legal right to do, is a question which cannot be answered. Professor Duguit thinks it is only a question of time when the American practice will be introduced in France; the council of state especially by its decision of 1907 admitting recourse in annulation for excess of power against ordinances of public administration has, he says, already prepared the way; such ordinances differ in no intrinsic respect from statutes and it is therefore only a short step to the recognition of a similar recourse against the latter class of laws.[78] The late Professor Saleilles said in 1902 that he had not lost all hope of seeing recognized the right of the French courts to pronounce the nullity of laws in violation of rights clearly defined in the constitution.[79] But others are less optimistic.[80] It is quite certain that so long as the present notions regarding the political preponderance of parliament continue no court is likely to assert any direct or indirect control over its acts and, if it should, parliament would not tolerate it, for it is extremely jealous of its prerogatives as over against the executive and the judiciary.

After all, the matter is of far less practical importance than in the United States where the constitutions are instruments of specifically delegated and prohibited powers. It must be borne

[78] *Transformations du Droit Public*, p. 103.

[79] *Bul. de la Soc. de Lég. Comp.*, 1902, p. 241.

[80] M. Jèze for example, commenting on the view of Moreau and Duguit that the decision of the council of state in the *Winkel* case in 1909 was in effect a refusal to apply a provision of the law of finances of 1905 in regard to the removal of public officers, says: "I do not believe anyone can cite a single case in which a court has declared a law unconstitutional, and I do not for my part see a single indication in favor of a change in the existing jurisprudence, however much it may be desired. *Principes Généraux*, p. 212.

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in mind, that the French constitution is merely a law of organization; it does not undertake to define and enumerate the powers of the legislature, and, as has been said above, aside from the few rules regarding procedure, it contains no direct or indirect prohibitions on the legislative power. If, therefore, the courts had the unquestioned right to annul acts of parliament for unconstitutionality there would be few occasions for exercising it, because few acts can be contrary to the constitution in its present form.[81] For this reason some writers take the position that little or nothing would be gained by allowing the courts such power, until individual liberty has been "constitutionalized."[82] Finally, the absence of a clear distinction between the constituent and legislative powers would render the system of judicial control ineffective in the face of a parliament determined to make its will prevail regardless of constitutional restrictions. Both the constituent and legislative powers in France are vested in the same body, and if the courts should refuse to apply an act which is contrary to the constitution parliament would only have to organize itself in national assembly and "constitutionalize" the law thus nullified, after which it would be beyond the control of the judiciary.[83] To make judicial control of unconstitutional legislation really effective, therefore, it is necessary to separate more completely the legislative and constituent powers and entrust them to different organs as is done in the United States.

[81] "To speak truly," says Cahen (*La loi et le Règlement*, p. 424) "France has no true constitution; it has laws which fix the organic relations of the public authorities but it has no charter of public liberties in the absence of which the men of the revolution said there could be no constitution." "In France I repeat," says Seignorel (*Rev. Pol. et Parl.*, 1904, p. 536), "we have no constitution; we have only laws relative to the functioning of the public authorities. In this respect we are in a condition of notorious inferiority as compared with other countries."

[82] Such was the opinion of Professor Saleilles, *Bul. de la Soc. de Lég. Comp.*, 1902, pp. 245–246. Compare also the comments of Prof. W. F. Dodd, "Political safeguards and judicial guarantees," in the *Columbia Law Review*, April 1915, p. 12.

[83] Compare the remarks of Seignorel on this point, p. 519.

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THE SUBSTITUTION OF RULE FOR DISCRETION IN PUBLIC LAW[1]

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The course of recent legislation for the regulation of commerce, trade and industry has created the impression that there exists a tendency in our law to transfer powers of determination from the courts which act according to fixed principles to administrative commissions or officials vested with large discretionary powers.

Considering that normally the progress of law should be away from discretion toward definite rule, such a tendency should receive the most careful examination. The first inquiry should however be whether and to what extent the impression is substantiated by facts.

The advent of the new administrative power is in the public mind associated chiefly with public utility and industrial commissions first created for the control of railroads, for the earlier powers over banks and insurance companies, as well as those of medical and other licensing boards, attracted relatively little attention or comment.

These commissions have indeed been vested with powers of a type hitherto withheld from administrative authorities under our system, powers which are not intended to serve as instruments of a fully expressed legislative will, but which are to aid the legislature in defining requirements that on the statute book appear merely as general principles.

While this undoubtedly constitutes in a sense a delegation of legislative power, it is not always equally certain that there is also a substitution of a wide administrative discretion for a fixed

[1] This paper was read at a meeting of the Legal-Philosophical Conference in Chicago, in April, 1914.

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rule to be administered judicially. It is true that such a substitution takes place, where e.g., a definite legislative railroad rate is repealed in favor of a commission power to fix a rate required by statute merely to be reasonable.

But has it been as a matter of fact the course of the new legislative development to supersede specific by generic rules? Probably there are such cases, though I know of none in the field of railroad legislation. The evolution has rather been from generic legislation to administrative power to carry such legislation into effect by specific requirements.

How did that generic legislation operate? By leaving the question whether it had been complied with to a determination by a judicial proceeding. Reasonableness, safety, adequacy, etc., thus became issues in a civil or criminal action, and as mixed questions of law and fact they went to a jury under instructions by the court. Notwithstanding these instructions there remained a very considerable discretion with the jury. In criminal proceedings this was apt to operate in favor of the accused, because a jury will not lightly send a person to prison, but in civil cases for damages, especially against a corporation, the plaintiff was not unlikely to win a verdict from a liberally inclined jury.

In labor legislation therefore employees prefer a generic to a specific rule. It has been observed that under the present mining law of Illinois which contains very specific requirements, the chances of recovery are impaired by the result turning on the presence or absence of certain safeguards, while on a general issue of safety a jury might find a verdict in favor of the plaintiff. Obviously, the element of discretion allows the play of sympathy and is therefore desired by those counting on sympathy.

The result of the new administrative power, though likewise in a sense discretionary, is plainly the other way: it substitutes for the more or less arbitrary judicial action—arbitrary because delegated to a jury—a fixed and responsible rule.

The new development is therefore not such as is often assumed, but the very reverse.

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The real significance of administrative ruling authority then does not lie in any diversion of genuine judicial power, but in relieving the judiciary from functions in their nature more or less legislative.

It will be asked: why, if the judicial enforcement of vaguely formulated requirements was not satisfactory, were statutes not made more specific? The answer is, that this has been done to a considerable extent, notably in the domain of labor legislation and of safety requirements, the mining and factory legislation of Illinois furnishing conspicuous illustrations in point.

In railroad legislation, however, which shares with liquor legislation the distinction of having furnished American constructive statutory policies their strongest opportunities and tests, a similar specialization whether in the matter of rates or service requirements, has proved impracticable, and it was therefore in this field that the delegation of quasi-legislative powers set in. It is much more recently that it has been advocated for other industrial legislation, as being calculated to secure greater flexibility and adaptability to circumstances, and the principle has had its most notable triumph in the minimum wage legislation of 1913, Utah alone having ventured upon a direct legislative schedule of rates. Most typical of the new legislative policy is however the Wisconsin industrial commission act of 1911 which simply requires employers "to furnish employment which shall be safe for the employees and to furnish places of employment which shall be safe for employees and frequenters, and to adopt and use methods and processes reasonably adequate to render places of employment safe."

If the main purpose of the new departure is to be greater flexibility, and by flexibility we are to understand not merely differentiation but variability of regulation, it can be endorsed only with great reservations. Differentiation can be secured by statute as well as by administrative ruling. Variability, on the other hand, is desirable only in very few phases of social or economic regulation, while industry needs above all permanence and continuity of policy and requirement. If the delegation of powers were to encourage impermanence and fluctuation, though in

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pursuance of a progressive policy, the result might easily become intolerable.

It is probably needless to entertain undue apprehensions in that respect; the force of circumstances will impose upon commissions a proper degree of conservatism, and if inferences may be drawn from foreign experiences, it is worth noting that American statutes change more frequently than the regulations of the German Federal Council.

Weighing relative advantages, it may be expected that administrative action can be set more easily in motion than legislation, and that it can better plan a program of gradual development; that while administrative authorities have a better sense of what is practically enforceable, legislatures have a keener sense of what is politically expedient, that while the former can mix suasion with command, the latter can invest their commands with greater publicity and a higher moral authority. Administrative action will be preferred by those who believe in regulation, legislative action by those who consider regulation a necessary evil.

Administrative action has however the indisputable, though incidental advantage, that it permits the process of establishing rules to be surrounded by procedural guaranties and other inherent checks which will tend to produce a more impartial consideration than the legislature is apt to give, and which should in course of time, if not immediately, substitute principle for mere discretion. Such a result would mean an enormous step in advance for our entire system of public law, and it is therefore important to inquire whether we are justified in expecting it.

It is not of course contended that this result necessarily attends the vesting of discretionary power in administrative authorities. On the contrary the history of discretionary administrative power would seem rather discouraging. It is not necessary, in order to prove this, to refer to so conspicuous an instance of the arbitrary exercise of administrative discretion as the valuation of property for purposes of taxation, for the demoralization of administrative action is here plainly due to impracticable or mistaken legislative policies, and if public opinion insists upon a policy in legislation which it repudiates in administration, there will be an inevitable loosening of administrative standards.

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It is fairer to test the operation of discretionary powers by such normal administrative functions as the appointment and removal of officers, or the grant of licenses. Unlimited and unregulated control of official tenure led to the prostitution of the civil service to the game of party politics, and the remedy is now sought in the enactment of civil service laws, the main purpose of which is to reduce or altogether eliminate discretionary power. In the matter of licenses, discretion has generally been qualified, and upon the basis of the qualifying restrictions the courts have on the whole been able to cope with gross abuses of discretion. There remained however enough of favoritism and corruption to lead the State of New York to abandon the system of discretion altogether in the matter of selling liquor, and in Germany all trade and business licenses are granted upon the basis of conditions which make administrative discretion judicially controllable.

Generally speaking, therefore, it would seem that discretionary administrative powers have not been signally successful. Nor is this surprising: for in a government by law discretion ought to have a very limited place in administration. Its legitimate function is indicated by the organization of a chief executive power which stands for that residuum of government otherwise subject to law which cannot be reduced to rule. Where discretion appears in inferior positions, it is either the confession of inability to discover a guiding principle, or the deliberate preference of personal influence to more objective considerations, i.e., the more or less unavowed manifestation of the shady and corrupt aspects of government.

It is a striking historic fact that the organization of English administration has had a strong judicial cast until the simplicity of that system broke down under the demand for more technical functions of administration. Judicial administration meant the exercise of discretion in forms which secured at least some of the benefits of rule and system.

Those processes to which rule could not be well applied—including the ascertainment of facts and values—the spirit of the English law was averse to entrust to the regular organs of the

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administration, and they were consequently vested in the organs of self-government: jury, justices of the peace, and locally elected officers.

And in the like manner the function of government, which in a manner stood above and outside of the law: the variable element of policy, the constant readjustment of political life and of government to changing economic and social conditions—in other words, the function of legislation, was eventually withdrawn from the permanent organ of the state, the crown, and vested in the people's representatives.

The development of political institutions in America emphasized and strengthened what may be called the irresponsible elements in government. Much of the administrative business that in England had been in the hands of the justices of the peace and had been treated by them in a semi-judicial manner was transferred to purely administrative authorities, and these were placed upon a self-governmental, non-professional basis. The power of the jury, the least responsible of all the factors of government, was enlarged at the expense of the judiciary, the one stronghold of professionalism, and in allowing juries to determine sentences in criminal cases, the most incisive exercise of governmental power was made the type of the most arbitrary discretion. The functions of the legislature were increased by adding to the determination of policies and the control of finance, the chartering of corporations and the initiation of public works and improvements. And the legislatures gained an independence of executive guidance and initiative such as no other legislative bodies have ever had.

We get this peculiar vicious circle in the relation between discretion and self-governmental organs: a function which is exempt from rule because no applicable rule is known or none is desired —in itself a symptom of some governmental anomaly or imperfection—is committed to authorities which are closest to the people, elected, non-professional, holding by a brief tenure; and being in the hands of such authorities, the function is bound to retain the arbitrary type of discretion, for self-governmental organs lack the inherent checks which in professional organs evolve

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principle out of constantly recurrent action. This is certainly borne out by American experience.

If we examine the history of our administration, there has never been any ascertainable standard in the selection or removal of officials until the advent of civil service commissions. There is no more important function than the grant, refusal or revocation of liquor licenses: is it possible to point to any American jurisdiction in which the administrative practice in this matter has been reduced to a recognized system? In Massachusetts there is a statutory power to revoke amusement licenses at pleasure; such a power is intolerable if not exercised in accordance with known rules, but no rule has been laid down in print and probably none exists.

Legislation is equally poor in self-imposed norms. The nature of legislative action, dealing as it does with constantly new problems by new and untried remedies, naturally demands greater freedom of movement. Conceding this there remains much even in the business of legislation that is reducible to principle. The spirit of the equal protection of the law demands a firm adherence to uniform intelligible criteria of discrimination; requirements of health and safety should be standardized, and in economic adjustments there should at least be a submission to the generally accepted truths of political economy.

It is not of course meant to imply that all legislation falls short of these standards, but merely that there is not the slightest assurance of uniformity of standards, and that the absence of rule inevitably results in an excessive proportion of inferior and defective measures. The condition may be assumed to be notorious; were it necessary to substantiate the charge, it would be sufficient to point to the bulk of our legislation. The combined collection of statutes for Prussia and Germany for 1911–1912 covers 483 pages, the English statute book (for the entire United Kingdom) for 1911 458 pages, for 1912, 146 pages. The acts of the sixty-second Congress from December 1911 to March 1913, are contained in two volumes of large size, the public acts alone covering 1026 pages, and the private acts 423 pages in addition. The Session Laws of New York for 1911 cover 2751 pages, for

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1912, 1377 pages, for 1913, 2220 pages. It is probably true that Congress and New York represent the worst type of American legislation; Illinois makes a much better appearance; but every student of legislation is painfully aware of the mass of crude and ill-digested matter that annually or biennially emanates from our legislative halls.

It is particularly instructive to compare special legislation in America with special legislation in England. Parliament being controlled by powerful traditions curbing discretion, evolved methods of procedure in passing private acts which invested the enactment with the uniformity of judicial procedure. Thus divorces were granted only on strictly limited grounds, and the method of procuring them was rigidly prescribed and never departed from. In America the same matter was sometimes treated as a joke, as where an act of Missouri granted a divorce because the parties could not live happily together and "because the happiness of the people should be the ultimate aim and object of all governments." So much of special legislation went by favor or corruption that in many States it was deemed wisest to suppress it entirely by constitutional prohibition.

If in Europe legislation is a more orderly and systematic matter than in America, if it is possible to discern in the diversity of legislative policies a steadfast adherence to controlling principles at least in the technical and objective phases of statute law, this is due chiefly to the initiation of nearly all important measures by the organs of the executive government. Even with the greatest freedom of parliamentary amendment legislation retains the character given to it by its introducers. Executive preparation impresses upon it such unity of tradition and purpose as the government itself possesses, and the necessity of defending measures in the face of parliamentary criticism compels the government to fortify itself at least with the show and semblance of principle.

It is noteworthy that after a thorough inquiry into a department of legislation in which the absence of rule and system has been particularly prejudicial to public interests, viz., the appropriation and expenditure of public moneys, a recent presidential

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commission urged the preparation of systematic estimates by the executive as the only adequate means of standardizing public finance. The suggestion met with no favor on the part of Congress. It is of course difficult to convince Congress that it has not only fundamentally mismanaged a business to which the greater portion of its labors has been directed, but that by the nature of its constitution it is incapable of effecting a reform without outside aid.

But it is not beyond the range of possibility that public opinion will insist upon the executive assuming a controlling share of legislative initiative, and if so we might well expect a duplication of European conditions.

It will be asked: have we not a body of constitutional law to provide us with principles of legislation? The answer must be rather negative.

Insofar as judicial control over legislation is exercised on the basis of fundamental guaranties, it enforces a minimum and not a maximum of reasonableness of legislation, and is therefore no substitute for the principle producing factors in the European systems; on the contrary, the judicial point of view is liable to impress itself upon legislators to the extent of inducing the belief that constitutionality is an adequate standard of principle and justice.

If constitutional law looms large in our estimation it is on account of its practical importance in litigation. Being an essential tool to lawyers, it has given rise to an enormous literature. The very much more fruitful principles of legislation evolved in the government departments of Germany, France, and Great Britain on the other hand cannot become the subject of forensic discussion, and have remained a bureaucratic tradition, unarticulated and unformulated in systematic exposition, and they are generally regarded as lying outside of the domain of legal science.

Nor should we expect the evergrowing bulk of our written constitutions to yield an adequate supply of principles of legislation. Not as if the governmental experience of the nineteenth century had not been crystallized into some limitations of the utmost

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value; but let any one study the trend of our written constitutions, and he will be surprised to find to what slight extent our constitutional conventions have been principle producing agencies. The constitution-making democracy concerns itself very little with the quality of legislation.

It would also be unwarranted to treat the present tendency to delegate the specification of generic legislative requirements to administrative commissions as a beginning of a revolution in our legislative practice; for it is only within very narrow and definite limits that the practice is constitutionally desirable and legitimate.

So far as it goes however, it will furnish a capital object lesson of the development of rules for legislative action. It is obviously the legislative intent that administrative action in the exercise of delegated powers of subordinate legislation shall be of a superior type, that it shall be quasi-judicial, and—in some cases—subject to judicial review.

We have come to associate a due recognition of permanent principles with the administration of justice and its methods of procedure tending to emphasize the impartial and objective point of view. The judiciary has however by no means a monopoly in this regard. Similar results are likely to attend other official action, provided that it be sufficiently detached from the strife of interest and imbued with a sense of professionalism. It shares with judicial action the respect of precedent and the respect of expert opinion, habits of mind which distinguish both from the irresponsible action of popular bodies.

So far as can be judged from the practice hitherto pursued by the Interstate Commerce Commission, by state public utility and industrial commissions, civil service commissions, and accident boards, the main conditions will be observed which are apt to produce a body of principles for the framing of rules. Even the absence or scarcity of statutory direction for the exercise of the rule-making power may be condoned if it means that the legislature believes that wiser observances will assert themselves by the gradual operation of judicial procedure and of precedent. It will remain to be seen whether ultimately it will not be necessary to

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give to these directions a statutory form. The next ten or twenty years may be expected to teach us a good deal with regard to this matter.

Though the movement is yet in its beginning, we have already rule-making administrative bodies dealing with such diverse matters as fixing of rates, valuing property, standardizing efficiency and compensation in public service, prescribing health and safety requirements, fixing tests of disability, and advising or prescribing wage schedules.

Probably all these matters are not in an equal degree amenable to rule and principle. Not all government can be standardized. In the ordering of public as of private affairs, there is a legitimate place for wisdom and judgment, and even, where there are hidden or imperfectly understood forces and agencies, for speculation and chance.

Even in these matters there may be a limited opportunity for applying principle. Though it be impossible scientifically to determine standards of service or of compensation, it may be possible to estimate certain considerations at their true value and give them effect accordingly. Public undertakings will probably always remain matters of discretion, but their financing can well become matter of rule. And so all along the line. Not the least valuable effect of a wise delegation of power will be that it may enable us in the light of experience to judge better the respective provinces of rule and discretion, and organize public action accordingly.

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THE TREND WITHIN THE BRITISH EMPIRE

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I

Notable among the realities brought into sharp relief by the present war, is the spontaneous display of loyalty on the part of the British dominions. These "new nations within the empire," notwithstanding a natural pride in their embryo consciousness of nationhood, have enthusiastically and of their own volition rallied to the support of Britain the head of this same empire. The apparent anomaly inherent in this state of affairs merits its notice in view of its importance as a bed-rock principle in the politics of the empire. Moreover, the unique political status enjoyed by the dominions invites attention by reason of its very disagreement with the traditional view generally held as to the normal relations between colony and parent state.

It is only within the past decade and a half that the older of the British dominions, bursting the colonial chrysalis, have begun to emerge into nationhood. Amid the transitions of the present age none is more significant than that which is changing the structure and organization of the empire. That this transition has not been more generally recognized is not surprising. Even the inhabitant of the British Isles has found it difficult to understand the attitude and temper of his fellow-citizen of the colonies. To the Englishman of the past the notion of imperial union was based on a helpless and enforced "loyalty." While talking easily of an alliance of the British dominions he looked askance on the aspirations and proposals of the colonials and attempted to maintain his own supremacy. Happily, however, British statesmen of vision began to take cognizance of the growing sense of nationality which was permeating the dominions.

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It was apprehended that Canada and her sister states, peopled by men "born of the blood," would sever the tie some day if they were not permitted to acquit themselves as nations. Only a mild form of surprise, therefore, need be felt over the fact that, at the colonial conference of 1907, the secretary for the colonies concurred in the principle laid down by the British prime minister that "the essence of the imperial connection" is to be found in "the freedom and independence of the different governments which are a part of the British empire."

During the years since this significant declaration was uttered, events have conspired to make more real the ideal of a Britannic alliance toward which many believe the empire has been tending. This alliance or league of free states—Great Britain, Ireland, Canada, Australia, New Zealand, and South Africa—it is maintained would be held together partly by mutual advantages and partly by sentiment. Possessing nationhood and political equality, the members of the alliance would coöperate in war and peace under agreed conditions. In a prophetic utterance of Sir Wilfrid Laurier lies the kernel of the creed of the imperialist. "We are going to build the British Empire," declared Sir Wilfrid, in July, 1910, in the course of an address in the Canadian West, "on the rock of colonial autonomy, and that local autonomy is consistent with imperial unity."

The spirit of colonial nationalism, so powerful a force in each of the dominions, is based on two fundamental principles. In the first place, these states are strongly determined to remain members of the empire, whereas, in the second place, they are equally determined to retain, if not to increase their rights of self-government, already practically complete. This seeming paradox is a monument to British statesmanship, blind and halting as the latter has appeared at times.

To the average man, not a citizen of the empire, this condition of affairs is difficult to comprehend. Indeed it is not unlikely that many in Germany anticipated that England's participation in the war would present an opportunity, which could not be resisted, for Ireland, India, and perhaps other states to weaken, if not destroy, their British connection. General von Bernhardi,

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in fact, in *Germany and the Next War*, calls attention to this very possibility. There is peril to England, he asserts, "in the nationalist movement in India and Egypt, in the growing power of Islam, in the agitation for independence in the great colonies, and in the supremacy of the German element in South Africa." "The coöperation of these elements," Bernhardi anticipated, "might create a very grave danger capable of shaking the foundation of England's high position in the world." That this has not occurred is not an accident. An explanation may be drawn from a statement of the late Admiral Mahan. In a letter to an English friend in October 1914, he declared, apropos of England's participation in the war, that "the testimony to the uprightness and efficiency of her imperial rule, given by the strong adhesion and support of India and the dominions, is a glory exceeding that of a pitched battle and overwhelming victory."

Whereas with the self-governing dominions, peopled for the most part by Anglo-Saxons, natural race sentiment has played a part in the determination of the public attitude, in no wise can it be urged that such a feeling has had any bearing on the decision of India. Although the aim of the present paper is to point out certain aspects of the present status of the dominions and to venture an opinion as to the future, it may not be amiss to refer in passing to the case of India.

II

With naïve candor, the underlying cause of India's loyalty in the present juncture is revealed in a statement of the Nizam of Hyderabad, the largest Mohammedan state in India. This Indian prince is reported to have declared that "it is the bounden duty of the Mohammedans of India to adhere to the British, for there is no other country in the world where Moslems enjoy such liberty as they do in India." The gratuitous offers to England by Indian princes of supplies of the "sinews of war" would lend color to such words. Although India has no great love for England as England, she has a deep attachment for the ideal of free institutions and fair dealing which the Englishman has attempted to realize in his administration of the great eastern dependency.

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The intelligent leaders of India recognize the fact that no other régime, attainable at present, would result in any greater, if indeed as much, freedom and justice as is at present in existence. The present adherence of the East Indian to British rule is the logical outcome of a dispassionate scrutiny of the demands of his own best interests. In the opinion of Saint Nihal Singh, "India today is inspired with the desire not merely to preserve the *status quo* into which it has been drifted by the tide of fate, but longs to weld the bonds that link it to the British empire—to become a willing partner in the federation." In commenting on a paper read at a meeting of the East India Association on November 23, 1914, on "India's Rally round the Flag," Mr. Synd Hassain, a Mohammedan, declared that in "the convinced opinion of every educated Indian the future salvation of India was bound up in adequate, honorable and equal coöperation with the British." Continuing, he urged that "apart from other considerations, on the sheer ground of self-interest and of the well-being and prosperity of India, they meant to stand by England through thick and thin."

Once this fact is recognized less surprise will be occasioned by India's refusal to engage in a holy war on the side of Turkey. Upon the entrance of Turkey into the European struggle as an ally of Germany and Austria with the accompanying call upon all Moslems to join the standard of the Sultan, a rejoinder was evoked from His Highness Aga Kahn, the spiritual head of the Mohammedans in India. In a message to his people he declared that, "Turkey has now lost her position as trustee of Islam. She has drawn her sword in an unholy war and it is the duty of Moslems of today to remain faithful to their secular and temporal allegiance." Accordingly the spectacle is presented of Mohammedan troops warring against fellow religionists. Native regiments from India have eagerly volunteered for service. In no small degree the failure of the Turkish expeditions against Persia and Egypt is to be attributed to the resistance offered by British Indian troops.

However, it must not be assumed, therefore, that India is entirely satisfied with British rule as it stands to-day. Although,

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as Tajpat Rai, a leader of the nationalist party in India, has recently averred, "India is determined to take her rightful position in the world, if possible, as a member of the British empire," political conditions prevailing in the country are not yet entirely to their liking.

That a real economic advance has been brought about in India through the efforts of England will probably be conceded by most unbiased observers. The British have acted on the principle that material welfare must precede, or at least accompany, genuine political evolution. Accordingly in a country so dependent on an adequate water supply irrigation systems have been extensively developed. By March, 1907, there had been constructed 55,928 miles of main and branch canals commanding 50,000,000 acres of land fit for cultivation, and the area actually irrigated in 1906–1907 was 21,992,683 acres. There were over forty additional projects either under construction or subject to government investigation. One of these schemes, approaching completion, is to carry the water of the Kistna River to seven counties and reclaim or increase the productivity of thousands of acres. As further evidence of the effort of the government to meet the needs of the population, witness the improvements made in transportation facilities. Approximately 35,000 miles of railways have been constructed and the country is also being provided with a network of macadamized roads, over 60,000 miles of such highways being already in existence. India is also the scene of a gratifying industrial development. Between 1870 and 1911 the number of cotton and jute mills increased from 78 to 293. During the same period the output of petroleum jumped from 6,000,000 gallons to 225,792,094 gallons. Coal production has been rapidly developed, the yield in 1911 equalling 12,715,534 tons. In 1912 there were 2463 joint stock companies; the number being three times what it was in 1877, while during the same period their capital also showed growth. The government has steadily increased postal and educational facilities, spending during the year 1914, approximately $20,000,000 on education. The systems of land tenure and land revenue assessment have undergone much needed reforms, taxes have been rendered

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lighter, and a strict impartiality has been insisted upon in the courts of justice.

Although India is a land of poverty, the condition of the people is improving. In the annual address of the Parsee chairman of the Bombay Stock Exchange a few years ago, it was asserted that "it is the conviction of merchants, bankers, tradesmen, and captains of industry that India is slowly but steadily advancing along paths of material prosperity." There is one very real grievance, however, of an economic nature. The countervailing duties levied on cotton fabrics and yarns made in Indian mills, in order to prevent the import duty from serving as protection to the Indian manufacturers as against those of England, may legitimately be deemed a hardship. The popular impression that a part of Indian revenues is appropriated by England as a species of tribute may summarily be dismissed. Every farthing of Indian revenues is either expended in India for services rendered or is sent out of the country for the legitimate purposes of providing pensions to retired Indian officials and of paying interest to foreign lenders of capital invested in India.

As to the political grievance that the administration of India has been carried on too much for the benefit of the rulers themselves, a brief reference will suffice for the purposes of this paper. It should be pointed out that since 1879 the number of Indians in public service has been steadily increasing. In the government of India the British have aimed at administrative efficiency pure and simple, with the result that formerly few positions of responsibility were filled by natives. That a rapidly growing number of offices of power and dignity are now being filled by Indians is not due to a waning desire on the part of the British to preserve the cherished traditions of the civil administration but rather to the ability of the natives to meet the required tests. Not the least important achievement of British rule has been the building up of a large body of Indian public officials capable of rising to offices of great trust. This is instanced by the fact that two members of the council of the secretary of state for India, one member of the governor general's executive council, or cabinet, and many of the judges of the highest courts in the country are Indians.

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III

At the present juncture, in view of the highly charged atmosphere of filial devotion and fraternal good will within the empire, it appears cynical if not downright sacrilegious to subject to analysis the loyalty of the British dominions. To impute any other basis for this sentiment than that of pure patriotism doubtless will be deemed the grossest materialism. It may appear to some to be emphasizing unduly the economic bases of human action and thus to be placing empire loyalty on an uncertain foundation.

On the contrary, however, an allegiance which is founded in part on natural race ties and in part upon legitimate self-interest is doubly buttressed. In a letter, in 1891, to Sir John Macdonald, then premier of Canada, Cecil Rhodes touched upon this issue. "The whole thing lies in the question," Rhodes maintained, "as to whether we can invent some tie with our mother country which will prevent separation. It must be a practical one, for future generations will not be born in England." In the same vein, Prof. W. J. Ashley, of the University of Birmingham, has professed a belief that the empire will eventually "break up unless some material means can be devised to make the colonials feel a common interest with us." Allusion must also be made to a speech delivered at Glasgow, Scotland, in October, 1903, by Joseph Chamberlain. Discussing the problems of imperialism, he referred to the dominions as "sister states, able to treat with us [in Great Britain] from an equal position, able to hold to us, willing to hold to us, but also able to break with us." In alluding to the statesmen of the colonies Mr. Chamberlain asserted that there were none who were not loyal to the idea of imperial partnership, an idea which they wished England might adopt more completely, while at the same time he had found none who believed that the then existent colonial relations could be permanent. "We must either draw closer together," he declared sententiously, "or we shall drift apart."

That the autonomous units of the empire have been drawing closer together, during the twelve years which have elapsed since

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Mr. Chamberlain's pronouncement, there is considerable circumstantial evidence. The policy of granting preferential tariff rates to Great Britain, adopted by Canada in 1897, has become general within the empire. The development of the colonial conference plan, during the past decade, bears witness to a desire to place empire relationships upon an equitable and permanent basis. And the spirit of the dominions, subjected since August 1914 to a practical test, has manifested itself in an instant submersion of party politics in imperial sentiment.

Significant evidence, that Cecil Rhodes' wish for a material tie between England and the dominions is apparently nearing realization, lies in the loyal allegiance of such regions as French Canada and Dutch South Africa. Race affinity obviously is not an element in the attitude of the Boer and the French Canadian toward England. In a message to the *Cape Times*, May 31, 1910, General Botha expressed the hope that United South Africa would become "a peaceful, progressive portion of the empire." Who in 1899 could possibly have dreamed of a constitution to which would be appended side by side, the names of General Botha, Dr. Jameson (now a baronet), General Smuts, Sir Percy Fitzpatrick, and others who were leaders of the opposing forces during the Boer War? The sudden collapse of the recent insurrection in South Africa is to be attributed primarily to the genius of Botha. It will be recalled that in the naval crisis of 1912, brought about by the question as to whether South Africa should stand with her sister dominions in support of the mother country, General Botha resigned the premiership. He explained his act on the ground that loyalty to the empire was incompatible with continued coöperation with a separatist Afrikander like General Herzog. It was almost unbelievable that the Boer generalissimo of 1902 should lay his head on the political block for the British navy in 1912. His return to power was a triumph for the imperial ideal and the spectacle is now presented of Briton and Boer acting together in pursuit of a common end.

In the somewhat grandiloquent phrase of Sir Etienne Pascal Taché the prevailing attitude of the French-Canadian is revealed.

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"The last shot fired on American soil," he affirmed, "in defense of the British flag would be fired by a French-Canadian." Sir Wilfrid Laurier, the venerable ex-premier, has declared that "whilst remaining French, we are profoundly attached to British institutions." The position of the church, the strongest factor in French Canada, has been carefully analyzed by André Siegfried in his volume *The Race Question in Canada*. "The church has unequivocally taken its stand," says Mr. Siegfried, "on the principle of a 'complete and final acceptance of British rule' while at the same time insisting on 'the passionate defense of the integrity of the French-Canadian race.'" The church has a genuine and openly expressed regard for British sovereignty. "British rule suits us perfectly," a French ecclesiastic of high rank has averred. "Thanks to it, the position of our church in Canada is excellent."

Herein lies a suggestion as to the nature of the magic device whereby Britain has kindled among diverse population elements a spirit of loyalty. By her strict observance of the provisions of the Quebec act of 1774, England has established permanently the civil, political, and religious rights of the French in Canada. It is probably true that the Catholic Church in French Canada is more strongly entrenched and in enjoyment of greater privileges than in any other country save Italy.

Similarly, the devotion of the Dutch element in South Africa is founded on the exercise of unusual rights. Despite the dismal forebodings of the opposition party the British government granted the privilege of responsible government to the Transvaal and the Orange River Colony in 1906 and 1907 respectively, less than five years after the Boer leaders had accepted the terms of the treaty of Vereeniging. By this daring and astute stroke of statesmanship Britain made possible the birth of the youngest of the daughter states. It is evident therefore that the loyalty of the dominions is not based on racial bonds alone. Material ties have been evolved during the twenty-four years since Cecil Rhodes deplored the absence of such. At the risk of offending the supersensitive soul it may be urged that these ties are the embodiment of the prosaic factor of self-interest. The present

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lot of the dominions is such as to produce feelings akin to self-exaltation. And equally true is it that the severance of the bond with England would entail great material disadvantage, while yielding few powers not already enjoyed. The dominions now exercise the essential rights of practical sovereignty. They enjoy practically, although not theoretically, legislative and administrative independence. As already mentioned, this virtual independence has been acknowledged by the British government. In the course of an address, delivered on October 27, 1910, before the University of Birmingham, the Hon. Alfred Lyttleton, late secretary of state for the colonies, asserted that "there is now a practical equality of status as between the parent country and the dominions."

The significance of this unique relationship it is difficult to grasp. Even yet it is not uncommon to meet an incredulous one who insists that the rights of self-government enjoyed by the dominions pertain only to the more unessential details of administration and that in the larger affairs of fundamental import the British government still retains the balance of power.

That the gift of autonomy granted by England to her "partner states" has no string attached to it may be made clear, however, by calling attention briefly to no more than two recent issues. The problem of immigration within the empire, and the naval controversy as waged within the dominions since 1909 abundantly illustrate the impotency of the British government to alter by direct means colonial legislation not pleasing to the home authorities.

IV

Of the diverse empire problems which Britain is called upon to solve none is more perplexing and provocative of disaster than the adjustment of relations between certain races within this "congeries of nations." The Indian immigration crises in South Africa and Canada have fanned into flame a problem which for long has been smouldering. "The conflagration thus started, if left unchecked, threatens to eat its way to the very vitals of Indo-British relations," Saint Nihal Singh admits, "and it may

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prove to be much more dangerous than any other contention that has arisen since the dread Sepoy mutiny of 1857."

Specifically the grievance grows out of the ill-treatment meted out to Indian immigrants in the British dominions. This in turn is but a phase of the larger issue of Asiatic immigration. Although in full appreciation of Asiatic virtues the various dominions—Canada, Australia, New Zealand, and South Africa—have fully determined to restrict if not virtually to exclude immigration of Asiatics. This decision is alleged to be based on the principle of economic self-preservation and not on prejudice against color or religion. The exclusion of the Chinese and Japanese is not attended by any unusual difficulty. To be sure, by reason of England's alliance of 1905 with Japan a certain delicacy was attached to the negotiations between Canada and Japan which culminated in the immigration treaty of 1907.

What renders the issue of Indian immigration peculiarly perplexing however is the fact that the East Indian, as much a British citizen as the Australian or Canadian, keenly resents being refused freedom of residence in portions of an empire of which he himself is a member. The Indian moreover is able to point with pride to his honorable record on many battlefields in support of the British flag.

For the purpose of the present study a brief summary of conditions will suffice. Whereas the various dominions have for years restricted Indian immigration, certain recent measures of a drastic nature on the part of Canada and South Africa have precipitated a crisis. Actuated by the common determination to maintain their land "a white man's country" the Canadian authorities denied to a group of Hindu would-be immigrants the right to disembark from their craft.

By reason of the relatively large number of East Indians already domiciled in South Africa, the problem in that colony is correspondingly grave. Whereas South African employers were eager as early as 1859 to import laborers from India under the indenture system, it was intended that the latter should return to India at the expiration of their term of service. Many however, for various reasons, remained in the country and engaged

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in such occupations as gardening and retail business, with the result that the present Indian population is estimated to be 160,000. To stem this current the colony adopted a restrictive policy designed to make their life intolerable. Chief among the hardships imposed upon the Indians are: the poll tax of £3 per annum on each Indian who remains in the country after his indenture, a tax to be levied as well on his wife and children (over a specified age); and openly questioning the legality of marriage contracted according to Hindu, Moslem, Sikh, and other non-Christian rites, and the legitimacy of children born in such wedlock.

Unfortunately for the peace of mind of England this is not a local issue capable of settlement by purely local legislation. Rather is it an imperial question of the widest dimensions. The British authorities are placed in an extraordinarily difficult position. On the one hand they must face the fact that South Africa, Canada, and Australasia, practically autonomous states, steadfastly insist on exercising their cherished rights of self-government. On the other hand, the imperial government cannot ignore the growing volume of protest from India against colonial oppression. The viceroy of India, Lord Hardinge, moved to action by public meetings at Bombay, Delhi, and other cities in India demanded of the British authorities a thorough and impartial investigation of the situation. He added, that in case the Indians' charges were sustained an emphatic protest would be lodged against "the inhuman treatment of a loyal section of his majesty's subjects." At the same time, General Botha, the premier of the Union of South Africa, informed the authorities that the Union while endeavoring to safeguard its own future was seeking at the same time, so far as was possible, to serve the interests of the empire as a whole. Any direct interference with South Africa in her course of action by the British authorities would probably precipitate a break in the present relations. Indeed no less an authority than the Hon. Lewis Harcourt, secretary for the colonies, referred to this very contingency in the course of a debate on the South African situation, in the House of Commons. In substance, he declared that they could readily

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smash the British empire in a day's debate in Parliament if they attempted to interfere with the autonomy which had been granted to its various parts. Happily however this does not preclude the exercise by England of a policy of moral pressure.

The gravity of England's dilemma is obvious. The uneducated Indians look upon the British sovereign as their all-powerful protector. Knowing nothing of constitutions and self-government and believing in the divine right of kings they have turned to Britain for help. If now they become disillusioned, if they find that the British authorities cannot shield their kindred from colonial harassment, a situation of alarming proportions may readily arise. With this essential fact clearly perceived by the dominions, it cannot be doubted that a spirit of moderation and reason will mark future action.

V

Not less eloquently does the naval controversy bear witness to the genuineness of the powers of self-government exercised by these autonomous states. Their freedom from compulsion is instanced by their varying reactions to the "naval crisis" which arose in 1909. Early in that year, as a result of Britain's anxiety over her threatened naval supremacy, New Zealand's loyalty expressed itself in an offer, to the mother country, of funds to cover in full the construction of a *dreadnought*. In Australia, despite the original agitation that the Commonwealth follow the example of New Zealand, the decision was reached to establish an Australian squadron. The first units of this fleet were to be built in Great Britain. South Africa, then undergoing the transition from the colonial status to dominionhood, did not depart from the policy of making voluntary naval cash contributions to Great Britain, a plan followed for years by Cape Colony and Natal. The policy adopted by the Laurier administration, in Canada, was distinctly nationalistic. The proposed navy was to be built in Canada and manned and wholly controlled by the dominion.

At no time has Canada contributed directly towards the support of the British navy in which respect it occupies a unique

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position. On the other hand, the voluntary contributions of the other dominions were clearly increased as a result of the colonial conference of 1902. At this conference, the Canadian premier, Sir Wilfrid Laurier, courteously but absolutely refused to accept the principle of direct contributions to the British, or an imperial, navy on the grounds that it would "drag the dominion into the whirlpool of militarism, that plague of Europe." This unwillingness to offer cash subsidies in behalf of empire defense was not based upon a lack of loyalty, as abundantly evinced since 1914. It was urged that by the development of their individual defense resources the dominions would in the long run best serve the interests of the empire as a whole. As a critical analysis of this view is not germane to the study in hand, it will not be attempted. In the formulation of his naval policy Sir Wilfrid always insisted unequivocally for the greatest measure of autonomy consistent with the maintenance of the British bond. Conceiving that form of imperial defense coöperation most in conformity with the dignity of the self-governing states to be the development of their individual resources, such a plan accordingly was adopted by Canada and Australia. To be sure the Conservatives under Sir Robert Borden appear to favor the "emergency" contribution plan, pending the determination of a permanent policy through submission of the question to the Canadian electorate.

Notwithstanding the frank recommendations of the British admiralty, in the past, that the contribution plan be followed by all the states the opinion may be ventured that the separate navy plan is destined to carry the day. Indeed steps already have been taken by New Zealand which suggest a reversal of policy preparatory to following the example of Australia. The prevailing view would seem to be that the Australian navy has justified its existence by the events which culminated in the destruction of the *Emden* by the Australian cruiser *Sydney*. Future action will not be uninfluenced by this event. Even from utterances of Sir Robert Borden evidence may be drawn that the naval policies of the dominions will be determined in the end not by the admiralty but by the colonial authorities. "Canada,"

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said Sir Robert, "means to have a voice in matters of imperial foreign policy. Canada will not be an 'adjunct' even of the British empire, but we have no desire to force the pace unduly —we know that we must creep before we walk."

VI

All this being so the question inevitably arises as to whither the British empire is drifting and as to what its future is to be. The ancient epigram that the empire is a huge accident "created in a fit of absent-mindedness" has not lost its pertinency with the passing of time. Without set design or intention, changes have taken place so gradually as to be almost unnoticed until fully established. The resultant situation introduced by "the unconscious convergence of many thoughts and wills in successive generations" is one which calls for conscious action. Notwithstanding the success attending the haphazard process of expansion in the past its continuance cannot be advocated with reason. The policy of *laissez-faire* is not invariably successful in the political, any more than in the economic, sphere.

Within recent years events have conspired to render progressively popular a policy of imperialism meaning thereby closer union of the empire in any form. Several decades ago imperialists within the British empire, few in number, were looked upon as visionaries. The transition in political thought has been so complete however that at present "the anti-imperialists have practically ceased to count," declares Richard Jebb, "whether in England or the dominions." There are few within the empire who would subscribe to the wish voiced in 1863 by Goldwin Smith that "the waste, peril, and humiliation" incident to the maintenance of England's dominions be terminated by "the simple and obvious solution of political separation." Much water has run under the bridge since the Imperial Federation League was formed in the eighties, with Lord Roseberry as its leading spirit, for the purpose of doing something, however vague that something was, which would secure the coherence and the constitutional *rapprochement* of the motherland and dominions.

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There is abundant evidence of the reality of an underlying desire to be one. Eloquent testimony of the strength of such a wish is presented in such events as the gratuitous extension by the dominions of tariff concessions to Britain, the sending of colonial contingents to South Africa at the time of the Boer War, the establishment of an imperial penny postage and an empire cable service, empire coöperation with the Allies in the great European struggle, and the calling of colonial statesmen to imperial council boards.

It may be taken for granted then that the aim of the imperialist is generally accepted by all parties in Britain as well as in the dominions. This situation discloses the progress that has been achieved by the movement for closer union. The end no longer being the controverted point, public opinion today is divided as to the means for attaining it.

Of the two solutions proposed imperial federation has the advantage of priority and in the number of adherents. The ideal of a Britannic alliance, too recent to have attained an impressive following, is deemed by its advocates however to be more in harmony with sentiment current in the empire.

In the scheme of federation the empire is conceived as an organic whole consisting of nations independent in local affairs and having distinct individualities, but by reason of underlying common interests developing a common imperial policy. Those matters pertaining to the empire at large, such as defense, commerce, and immigration would be subject to an imperial management in peace as well as in war. This would involve the creation of a federal parliament, comprised of representatives of Great Britain and the dominions, with an executive responsible to it. After twenty years of intellectual effort, however, the scheme still remains ill-defined.

Among the difficulties lying in the path of the federationist a few may be noted. As yet no proposal has been advanced for apportioning representation in the federal parliament or council which has met the approval of the dominions. Again, this legislative body attempting to debate empire immigration or foreign policy would find itself involved at every turn in matters which

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because of their local character would be beyond its jurisdiction. Most serious however is the consideration that although security may be attained through federation it is gained only at a sacrifice of liberty. The scope it allows to individuality is provincial rather than national. The measure of state autonomy which federation permits is far short of national independence. Imperial federation would probably carry with it for a period at least British ascendency owing to the inevitable preponderance of Britain in a federal parliament. Apart from the fear of ascendency however, which possibly is only an imaginary danger, the dominion federalists have met a reluctance on the part of their people to surrender any part of the national autonomy now enjoyed.

At a meeting of the British Empire League in Toronto, in May, 1901, the premier of Ontario discussed this question. "In a federated parliament of the British empire, Canada would be subjected," he declared, "to the decisions of the representatives of all parts of the empire—of men, that is to say, who have no knowledge of our social conditions or of our national aspirations." In the opinion of Mr. Asselin, the French-Canadian nationalist, "the idea of an imperial parliament legislating, even on some subjects only, for all the British realms, may appeal to the imagination, but no one as yet has shown how such legislation could be passed without the bigger and more powerful partners overriding the will, now of this, now of that colony."

Although the attitude of the dominions has been characterized as one of narrow pride in nationality rather than one of large-souled allegiance to the empire, the fact continues to stand forth stubbornly that the spirit of colonial nationalism cannot be ignored.

The conception of Britannic alliance, on the other hand, rests, in the opinion of Mr. Jebb, on "the theory that in democratic communities the integrating force which tends to make them organic is not the compulsive power of a central government but the conscious sense of mutual aid." It is urged that the growing unification of economic interests is tending automatically to bring into being an expanding and permanent basis for empire

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coöperation. Thus would disappear the necessity of any "overriding" imperial authority. Under this scheme there would be no call for any dramatic act of constitution-making, bringing in its wake a new imperial government. It would involve the process of *deliberately* continuing developments already well begun, supplemented by a further elaboration of the imperial conference to serve as a central organization. No less an imperialist than Lord Milner himself has outlined his ultimate ideal for the empire as "a union in which the several states, each entirely independent in its separate affairs, should all coöperate for common purposes on the basis of absolute unqualified equality of status."

To illustrate the underlying contrast between the two imperialistic policies, in question, allusion may be ventured to a hypothetical situation pictured by Mr. Jebb. We are asked to assume that Great Britain has resolved to enforce its treaty rights with China to compel the latter to continue to receive Indian opium so long as any opium is being produced in China itself. The procedure that normally would ensue under the operation of the Britannic alliance plan may first be outlined. In this scheme as already implied there would be no federal parliament. The British foreign secretary, who, by hypothesis, having made up his mind that China must be coerced, requests the Canadian and Australasian ministers to confer at once with him with a view to assembling the several units of the Pacific fleet in Chinese waters. The naval units of the Pacific, in the alliance scheme, would naturally constitute a part of the fleets of Canada, Australia, and New Zealand. The British secretary having pointed out the "emergency" would request the dominion ministers to cable their respective governments for the requisite orders in council, to make possible immediate action. "These ministers, however, would unanimously refuse," says Mr. Jebb, "to recommend the mobilization of the Pacific fleet for a purpose so repugnant to the national instincts of their people." Some other policy must be found, they insist. According to the federalists this would precipitate the much-feared end, the disruption of the empire, which they have insisted would be the ultimate conse-

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quence of the "separate navy" policy. Autonomists, however, the advocates of the alliance plan, fall back on a larger faith.

Under imperial federation the policy to be followed in meeting the assumed emergency would be determined in the federal parliament. Notwithstanding the opposition of the dominion representatives to the proposed exploitation of China the majority vote of the parliament would carry the day. On their return to their respective countries the dominion statesmen would attempt to soothe popular indignation by explaining that individual conviction must be sacrificed in behalf of "imperial interests." Such a contingency giving rise to a genuine dissatisfaction in the dominions over their empire status might the more swiftly hasten the very end which the federalist would avert.

Probably the most impressive charge against the principle of Britannic alliance is that technically it is inferior to centralization; theoretically yielding less naval strength, for example, for the same expenditure of money and rendering less certain the availability of all the fleet units in a moment of emergency. On the other hand, however, national patriotism as compared with imperial compulsion may properly be deemed a superior factor of efficiency. An empire which is to have any reality "cannot be maintained by pressure from the center on the circumference" but must exist and flourish by the spontaneous desire of the component parts to remain in a definite relation to the parent state by accepting the implied obligations. In brief this expresses the creed of the believer in Britannic alliance. He would add that if the dominions are to remain indefinitely in the empire it must be because none of them would have occasion to wish to leave it. This proposal possesses the additional advantage over imperial federation of being essentially in accord with recent developments within the empire.

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THE CONGRESSIONAL CAUCUS OF TODAY

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The convening of the 64th congress makes timely a brief discussion of the organization and operation of the Democratic caucus system in the house of representatives during the last two congresses; since the Democratic party remains in control of the present congress, it is to be presumed that the past caucus system will be continued in substantially the same form.

The caucus system used in the 62d and 63d congresses was adopted by the Democrats, upon their accession to control of the house in 1910, to replace Cannonism, which had become of ill repute among the voters, and which had been partly overthrown at the preceding session. The unwieldy size of the house, as well as the exigencies of party, required some extra-legal machinery to coördinate and direct the action of the members; the substitute chosen by the Democratic leaders was an adaptation of the senate caucus, formerly known as Aldrichism. The essence of Cannonism had been the control of the house by the speaker through his power of appointment of committees and his domination of the rules committee, backed by the power of the majority party caucus; the essence of the new system is direct control of legislative action by the caucus itself.

As at present constituted, the Democratic caucus is composed of all members of the majority party in the house. For the election of caucus officers and for the nomination of candidates for house officers, a majority of those voting binds the entire caucus; on questions of policy Rule 7 of the Democratic caucus rules reads:

"In deciding upon action in the house involving party policy or principle, a two-thirds vote of those present and voting at a caucus meeting shall bind all members of the caucus; provided,

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the said two-thirds vote is a majority of the full Democratic membership of the house, and provided further, that no member shall be bound upon questions involving a construction of the Constitution of the United States or upon which he made contrary pledges to his constituents prior to his election or received contrary instructions by resolutions or platform from his nominating authority."[1]

If a member decides not to be bound by the caucus on any question, he must notify the caucus in advance.

According to what has become the custom, shortly after the congressional elections those members of the congress then in existence who have been reëlected convene in a caucus; elect the caucus chairman, the party candidate for speaker, and the party floorleader for the coming session; and appoint the Democratic members of the ways and means committee a committee on committees to arrange all Democratic committee-assignments. In this action the newly elected members of course have no part, since their congress does not meet until nearly a year later; the caucus positions are thus easily dictated by the old leaders who have been reëlected. The caucus meets once more, a few days before the opening of the new congress, to consider the other side of caucus organization—the distribution of patronage among its members,—to appoint a representative to confer with a Republican representative on the committee-assignments of the minority party, and probably also to define the legislative program for the session.[2] The caucus is then ready for business.

Among the actual instruments which the caucus uses to control the legislative action of the house the basis is of course the

[1] *Lawmaking in America*, by Lynn Haines, p. 10.

[2] E.g. The resolution offered by Underwood of Alabama, floorleader: "*Resolved*, That the Democratic members of the various committees of the house are directed not to report to the house during the first session of the 62d congress, unless hereafter directed by this caucus, any legislation except with reference to the following matters." (*Caucus Journal*, April 1, 1911.)

N.B. It is interesting to note that the average attendance at the caucus of the 63d congress for consideration of important matters was 65 per cent of the membership of the caucus; that therefore 132 votes (out of 291 members) was the normal two-thirds majority for controlling party policies; and that 16 southern states had exactly 132 representatives.

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"binding resolution," through which a majority of two-thirds of those voting at the caucus binds the whole body of Democrats (except for Rule 7), and they in turn control the entire house.[3]

The control of the open voting of the house is however less important than the determination of what legislative material shall come before the house at all, for its consideration. The caucus controls the subjects upon which the house may legislate, in the first place, by controlling the house committees, and it controls the committees by controlling the selection of the majority members of the committees. As a matter of practice, the Democratic committee-assignments are really determined by a few leaders; since 1911 the nominations by the committee on committees have never been rejected by the caucus. This power of selection of the Democratic committee-majorities is of importance, first, because the majority members of committees may hold a miniature caucus in which a conclusion is reached which all are bound to support in the open committee; thus the minority members of the committee, when they are finally called in, find a completed bill which they have the high privilege of supporting or opposing as it stands. In the second place, the power of assigning members to committees is important to the leaders because the reports of committees (or of the majority membership of committees) exercise a considerable influence, even a control, over the caucus itself; "a careful study of the caucus records shows that with not a single important exception, the caucus ratified the action of a majority part of the standing committee which had the bill in charge."[4] And finally, the power of selecting committees is important: first, because the committees cannot in fact be compelled to report by the house and thus they apparently decide what matters the house shall be allowed to consider; and second, because, whenever a com-

[3] E.g., Resolution by Underwood (amended): "Be it resolved, by the Democratic caucus that we indorse the bill presented by the ways and means committee . . . . and pledge ourselves to support said bills in the house . . . . with our votes, and to vote against all amendments, except formal committee amendments, to said bills and motions to recommit, changing their text from the language agreed upon in this caucus." (*Caucus Journal*, April 11, 1911.)

[4] National Voters' League, Bulletin No. 1.

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mittee does report a bill, the chairman of the committee has charge of the bill in the house and apportions the allotted time for debate among his party.

As a matter of fact, however, the action of the committees in the house is often controlled by the caucus itself, in one of three ways. First, bills are often introduced in the caucus, worked out there, afterwards introduced into the house; their reference to a committee is then a mere formality. Second, the caucus may adopt a resolution forbidding reports on other than specified subjects, or by other than specified committees, without its express consent. And third, the house procedure is intentionally so inefficient that a special rule issued by the rules committee, under instructions from the caucus, is necessary to secure consideration for any bill not reported by one of the three privileged committees.

This brings up the subject of the house procedure. Briefly, the house rules have been so adapted and arranged that the house cannot compel its committees to report, and yet, if they do report, it is next to impossible for any bill to reach final consideration under the ordinary rules. Out of this chaotic situation there rise three privileged committees—those on rules, on ways and means, and on appropriations—which have the right to report at any time. This gives the chairmen of the latter two committees overwhelming influence on all financial matters; the scope of the power of the rules committee is still broader. In fact it is to his position as chairman of the ways and means committee that the majority floorleader owes his control in the house, for, as chairman, he has the right to recognition at any time and thus, by a motion, he may improvise a special rule to restrict debate or to shut off amendments. His power in the house is of course backed up by his domination of the caucus, in which his all-pervasive influence appears on every page of the proceedings. His personal ascendancy over the members comes largely from his control of committee-assignments as chairman of the ways and means committee and therefore of the caucus committee on committees.

The source of the power of the rules committee, of only ten

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men, is the absolutely unworkable system of house rules, which, on the one hand, makes it impossible for the house to compel its rules committee (or any other) to report, and which, on the other hand, makes the house dependent on the rules committee, since it is impossible for business to be transacted effectively by the house except under a special rule from the rules committee. This committee also controls all special investigations, for to it practically all resolutions constituting special committees are referred. And, further, it is the only agency able to compel a house committee to report.

The general control of the legislative activity of the house by the rules committee is exerted through three kinds of motions, as well outlined by Mr. Lynn Haines.[5] First are gag-rules, which introduce a bill, at the same time limiting debate and giving control of that time to the respective leaders of the committee which had the bill in charge. A second method of control is by special rule permitting the incorporation of alien subject-matter in appropriation bills. The third variety of motion, the "buffer," is used as a means of negative control, to postpone out of existence some politically dangerous bill (inadvertently allowed to approach a vote) by a special rule putting other bills ahead of it on a special calendar. Thus it is seen that the rules committee has "the power to advance directly, or to retard indirectly, any measure;"[6] it is the steering committee of the house. But it itself is completely subject to the direction of the caucus; it is rather a most essential instrument of caucus control of legislation, than a controlling force in itself.

It is in connection with the domination of the floorleader over the members of the caucus by virtue of his control of committee-assignments that we first strike the foundations of the caucus system; for, as Mr. Lynn Haines acutely observes, "the belief that the caucus can bind reluctant members to unanimity . . . . is false. The action of a caucus binds only those members who were bound by the 'organization' before the caucus acted."[7]

[5] *Lawmaking in America*, pp. 22–26.
[6] *Lawmaking in America*, p. 27.
[7] *Legislating with a Dark Lantern* (article), by Lynn Haines.

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This strikes the nail on the head: once the leaders agreed, they overawe the other members into submission by their supposed control over the three necessities of congressional existence—perquisites, patronage, and "pork." The fame or influence of positions on important house committees attract some, but chairmanships carry more substantial perquisites in the use of the committee-clerk, which allows the chairman to save the $1500 clerk-allowance which each representative receives. In the second place, the amount of patronage which each congressman is allowed to distribute depends upon his party-regularity, his submission to the caucus; also, committee chairmen are given the appointment, with the consent of their committees, of the committee-employees. And thirdly, to receive his share of the "pork"-appropriations for his district, a member must be "regular." It is these things that make being "read out of the party" a serious matter; "pork" and patronage are essential to reëlection, and party-obedience is their price. The ordinary congressman is tied hand and foot. The problem of caucus-reform is therefore the substitution of some other motive for submission to the caucus—unless we are to denounce the whole caucus-idea, and to do that is to attack our system of party-government.

Back of any criticism of the present caucus-system as such (and aside from particular defects), lies one of two opposing theories. There are those who maintain that in our national legislature we should have a system of individual responsibility, under which all bills would pass or be defeated by ever-shifting majorities, but the individual units composing these majorities would be responsible each for his own acts to the people of his own district. If each representative is to be held responsible as an individual for his acts, the acts must result from his free and independent will, controlled only by his conscience and his reason.

Yet all democratic governments seem to develop inevitably upon the theory of party-responsibility; if coöperation is found to be more effective in politics as well as in other walks of life, men cannot be kept from coöperation. In the United States, just as the occasion of the rise of party organizations was the

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lack of adequate nominating instruments, so the lack of any coördinating instrument in the midst of the chaos of congressional committees produced Cannonism, which was backed by the caucus, and has now produced the caucus as itself the supreme instrument. Woodrow Wilson, in his early book on *Congressional Government*, pointed out that "the caucus is meant as an antidote to the committees. It is designed to supply the cohesive principle which the multiplicity and mutual independence of the committees so powerfully tend to destroy."[8] He states the essence of the theory: "It should be desired that parties should act in distinct organizations, in accordance with avowed principles, under easily recognized leaders, in order that the voters might be able to declare by their ballots, not only their condemnation of any past policy . . . . but also and particularly their will as to the future administration of the government."[9] He even goes so far as to advocate unipartisan membership on house committees; the need for this has been met to some extent by committee caucuses.

Passing over the theoretical criticisms of the caucus and accepting, as we must, our party-system of government, we may turn to the problem of practical reform. It has been observed with penetration that reform of the caucus must come through reform of the house; that, if the house is once organized in a businesslike way, many of the evils of the caucus will disappear with the opportunities for its arbitary control of legislative action; what may be called its legitimate majority-control will then remain. A brief mention of the reforms needed in the house will sufficiently indicate their effect upon the caucus.

1. The house rules must be entirely reconstructed; at present the necessity of special rules "means not only that disorder, rather than order, is the accepted parliamentary situation, but also that whatever the house does 'constructively' is always in the hands of a few leaders,"[10] e.g., the rules committee. The opening wedge should be a "gateway amendment" to the rules,

[8] *Congressional Government*, by Woodrow Wilson, p. 326.
[9] Ibid., p. 98.
[10] National Voters' League, Bulletin No. 5.

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requiring the rules committee to report within a certain time any proposed amendment to the rules which may be referred to it; with the present independent position of the rules committee the old rules are rushed through at the beginning of a new congress, before the new and inexperienced members understand the rules' importance—after that they are helpless.

2. The entire house committee-system must be reformed: the dead, unused committees should be abolished; the committees should select their own chairmen, and employ and use their own employees. These two changes would strike at the root of the irresponsible control by the leaders, by eliminating their control of perquisites and of much of the patronage; the extension of civil service reform to all federal officers possible would do away with most of the rest of the patronage. Committees should also be required to report all bills referred to them, within a specified time.

3. Further, much of the congestion of business of the house could be eliminated by requiring the introduction of all routine business early in the session, by giving the District of Columbia self-government (its business now takes up one-thirteenth of the whole session), and by establishing a scientific budget-system. This last reform would not only save time and money, but it would largely wipe out the "pork" system of appropriations upon which the present caucus rests.

4. If an electrical voting-system were installed in the house, there would be no non-political reason why roll-calls should not be taken on all votes, in the committee of the whole as well as in the house. A chief reason for the superiority of the senate over the house is that roll-calls cannot easily be avoided.

5. Another reason for the senate's superiority is that its small size allows it to remain a deliberative body; the membership of the house should be reduced to a workable basis.

6. A fundamental and most valuable reform is the substitution of election of representatives in groups from a few large districts in each State, in place of election by single districts; with this should be combined some system of proportional representation. Such a plan would greatly weaken the power of

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the leaders of the caucus to control the caucus by distribution of local patronage and "pork" appropriations; it seems in fact desirable in every way, if not absolutely essential to the establishment of the caucus on a legitimate basis, in spite of the probability that no one party would have a majority in the house, and the resultant dangers of a multiplicity of parties. Some of the less exact systems of proportional representation have the advantage that the rougher apportionment of seats excludes all but the really strong parties from representation; thus the number of parties in the house would be kept reasonably few.

These reforms of the house itself will go far toward reforming the caucus, by making more discussion possible in the house; by giving the house as a whole control over its own instruments, the committees, and its own business, and by destroying to a great degree the corrupting means by which caucus control is enforced; it will tend to introduce a new motive for party-unity. The unity of the caucus will then be due more to a feeling that reëlection is to be won by each member through his support of the measures pledged in the party platform, and not by securing patronage or appropriations for his home-district; and the control of the caucus will be exercised in the open on the floor of the house, and not through devious and irresponsible agents such as the rules committee.

The reform of the internal organization of the caucus remains for consideration; and here criticism centers on the question of the open or closed caucus. The present rules provide that the meetings of the caucus shall be secret, but that a journal of the actual proceedings shall be published; roll-calls are not published except on demand of one-fifth of the members present—i.e., at most 58, on the average 40 members.[11] This compromise has been criticized on the ground that the publication merely of final decisions, combined with the difficulty of obtaining public roll-calls, leaves the caucus still irresponsible, a shelter behind which members may prostitute their convictions in the dark.

On the other hand, such a degree of secrecy is defended on the ground that full publicity would make impossible the har-

[11] Democratic Caucus Rules, Nos. 10, 11 (adopted Jan. 6, 1912).

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monizing of party discord which is necessary to party unity, and for which the caucus exists; the frank discussion which may now occur within the bosom of the party would be banished by the light of publicity. We cannot stop our congressmen from meeting, and, so long as their motives, their temptations, will not bear the public eye, they will meet somewhere in secret; we can but drive them farther from the Capitol. Yet—and here is the great difference—if the house organization is reformed as suggested, and most of the opportunities for control of patronage, perquisites, and "pork," are done away with,—the shady motives and the temptations to corruption will play a much less important part in the control of the caucus over its members. If the caucus once meets and binds its members to unity, because the party-responsibility to the country demands the execution of the party pledges as the price of reëlection, if the chances of reëlection of the *group* of party members from each large district depends on their support for the enactment of the party-platform into law, instead of the chance of reëlection of the *individual* member depending on the amount of government money he can get spent in his small district,—then there will be much less objection to throwing the caucus open to the public. "Publicity is perhaps the most essential characteristic of representative government," says Guizot. And in fact are not the people entitled to know as far as possible what influences are at work upon their representatives? Publicity is the protection of the honest man. And are not the people entitled to know how their representatives stand on questions of public or party policy? Else, how can they vote intelligently? The position of the representative can best be known through his votes; at present the people cannot tell how their representatives stand, for all important votes in the house are caucus-controlled—it is the votes in the caucus that count. Thus it is that we may say: reform the house and the caucus will take care of itself; without previous reform of the house, all reform of the caucus will be ineffective.

To conclude—from history we learn that means, however imperfect, will inevitably develop to perform certain indispensable unifying functions of government, for which no official provision

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has been made. We also see that the tendency of democratic government seems to be toward a system of party-responsibility; the party program is formulated by the national convention and transformed into legislative form by the congressional caucus; the party is collectively responsible. The legislative instrument of the party is represented in its most highly developed form by the Democratic caucus of the 62d and 63d congresses, the operation of which is based on two principles: strict party-unity on questions of essential party-policy; individual liberty in non-essentials.

But we have seen that the congressional caucus has many defects: that its control is placed too much in the hands of a few by the absurd internal organization of the house of representatives, so that it can be deviously and irresponsibly exercised; and that the control of the caucus over its own members rests on a false basis—the corrupting needs of the individual members, which are at present the price of reëlection. And we have seen that the fundamental causes of these serious defects extend far beyond the caucus itself and so can only be remedied through the house which supports the caucus.

Once the house is made efficient by remedy of these underlying defects, and once the rotten foundations of the caucus—patronage, perquisites, and "pork"—are destroyed, or, rather, replaced; the sinister, throttling domination of the caucus will largely disappear of itself, and the institution may be left free to develop as a legitimate instrument of majority control and party-responsibility on the open floor of the house.

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Democrats, and Radicals."[22] The Nationalists' annexation of their opponents' lawful and hitherto universally accepted denomination befogged the issue in the minds of those who voted and those who celebrated, for few of the former and far fewer of the latter were prone to spend their days in the casuistries and subtleties of political economists.[23] But what is more, it put the anti-Constitutionalists and thereafter the opponents of the administration on the defensive as disgruntled and dangerous dissenters and agitators. It cast heavily upon the anti-Federalists the burden of proof, of merely the defects of the Constitution, but the defects of its great framers. The stigma of the anti-Federalist of 1787, clung to the anti-Federalist of 1791, even after the latter's more or less graceful acceptance of defeat—the stigma of being an "anti," the weakness of mere negation, the brand of heterodoxy, the mark of political atheism.

Many years later the younger Wolcott accused Jefferson of accompanying his original opposition to the Constitution "with such circumstances of doubt and equivocation, as exempted him from the then unpopular imputations of being an anti-Federalist."[24] And what Federalism had come by this time to imply is shown by Judge Hopkinson, who writing to Wolcott from amid

[22] "Of the fraternity of politicians thus variously designated by the ingenious manoeuvering of the federal leaders, who well knew the force and value of a nickname, the writer of these pages requests to be considered as a member." (Thomas Cooper, *Declaration of Independence*, An essay on consolidation, 2d ed., Charleston, S. C., 1830 [?], 9).

[23] How violent a wrench was given by the Federalists to the usual and still accepted connotation of "Federal" is strikingly shown in the recent organization in the Union of South Africa of a "Federal League" to combat the centralizing tendencies of the Union, in the scheme of government of which the provinces have been greatly reduced in importance. The four objects of the "Federal League of South Africa" are, according to section 2 of its constitution: (a) To secure by every constitutional means the preservation of such federal principles as exist in the act of union. (b) To enlarge the powers and responsibilities of the provincial councils, and to secure the utmost possible delegation of administrative control to the provinces. (c) To obtain for the respective provinces the largest possible measure of local control over all matters of domestic concern. (d) Generally to secure for the whole of South Africa those features of government and administration which are best exemplified by the federal system." (*Cape Argus*, South Africa, July 11, 1913.)

[24] Gibbs, *Administration of Washington and Adams*, i, 121.

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the din and clatter of "two or three hundred merchants" in a New York tavern, complains that "the Federal spirit of this city is not worth a farthing. It is entirely unlike that which animates us in Philadelphia, and although as a Philadelphian I am proud of our preeminence, as an American I am mortified and distressed to find the difference. The people here . . . . seem plunged in the mire of commercial avarice . . . , they seem to consider themselves as having no kind of connection with the affairs of the nation and no interest in it."[25] It is not strange, then, that Noah Webster, who was quite as ready as his more illustrious predecessor to make lexicography the handmaid of politics, defined Federalist in the first edition of his dictionary (1806) as "a friend to the Constitution of the United States."

We now turn to what I venture to call the ritual of the worship of the Constitution, to the various manifestations of the cult in the national life. During the ratification campaign in Connecticut one of the newspapers pithily observed that "the Americans in Europe have been remarked for loving their country and hating their governments."[26] It would be supererogatory to dwell on the state of affairs under the Articles of Confederation that provoked this epigram. The orthodox description of it begins with "chaos" and ends with "imbecility." As far back as 1782 Robert Morris had feared that "the want of obligatory and coercive clauses on the States will probably be productive of the most fatal consequences,"[27] and Morris' complaints over the hopeless inefficiency of the Articles of Confederation were multiplied and elaborated with much enthusiasm in the struggle over ratification.

"Hear the complaints of our farmers, whose unequal oppressive taxes in every part of the country amount to nearly the rent of their farms. Hear too the complaints of every class of public creditors. See the number of our bankruptcies. Look at the melancholy countenances of our mechanics, who now wan-

[25] Ibid., ii, 49.
[26] *Conn. Gazette*, October 5, 1787; *Conn. Courant*, October 8, 1787.
[27] Wharton, *Dipl. Corr. Amer. Rev.*, v, 327.

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der up and down our streets without employment. See our ships rotting in our harbors, or excluded from nearly all the ports in the world. Listen to the insults that are offered to the American name and character in every court of Europe. See order and honor everywhere prostrate in the dust, and religion, with all her attendant train of virtues, about to quit our continent forever. View these things, fellow-citizens, and then say that we do not require a new, a protecting and efficient federal government, if you can."[28]

The readiness of the people for a change and a celebration is evident. "Our people," writes Sullivan to King, "expect so much happiness from the doings of the Convention that they stand ready to adopt anything which may be offered."[29] The feeling in Pennsylvania seems to have been the same. "An old Whig," while attacking the Constitution for the lack of a bill of rights to offset the consolidating tendencies of the instrument, nevertheless finds that

"Experience seems to have convinced everyone, that the Articles of Confederation, under which congress has hitherto attempted to regulate the affairs of the United States, are insufficient for the purposes intended; that we are a ruined people unless some alteration can be effected. The public mind has therefore been raised to the highest pitch of expectation, and the evident need of relief from the many distresses, public and private, in which we are involved, have reduced us to such a state that we can hardly endure disappointment. Scarcely anything that could be proposed by the Convention, in this state of the people's minds, would fail of being eagerly embraced. Like a person in the agonies of a violent disease, who is willing to swallow any medicine that gives the faintest hope of relief, the people stood ready to receive the new Constitution in almost any form in which it could be presented to them."[30]

The popular rejoicing on the ratification has often been adequately described. The fact that perhaps only five per cent of

[28] *Conn. Gazette*, November 9, 1787.
[29] King, *Life and Corr. of Rufus King*, i, 259.
[30] Reprinted from *Penn. Indep. Gazetteer*, in *Mass. Gazette*, November 27, 1787.

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the population of America had voted on the Constitution did not prevent the great majority of the other ninety-five per cent from celebrating what they conceived to be the genesis of a new America. The processions in Philadelphia, Boston, New York, Baltimore, Charleston, and New Haven, symbolizing, as James Wilson told the Philadelphia throngs, "a people free and enlightened, establishing and ratifying a system of government, which they have previously considered, examined and approved," were reproduced in miniature in every Federalist stronghold and there can be little doubt of their impression on the popular mind. "Public processions," said Wilson in his oration, "may be so planned and executed as to join both the properties of nature's rule. They may instruct and improve, while they entertain and please. . . . They may preserve the memory and engrave the importance of great political events. They may represent with peculiar felicity and force the operation and effect of great political truths." The force of Wilson's remark is shown in a letter written by a Philadelphian five days after the procession. "I have forgotten to inform you," he writes, "of two important facts that have occurred since the procession. First, it has been the happy means of uniting all our citizens in the government and second, it has made such an impression on the minds of our young people that "federal" and "union" have now become part of the household words of every family in the city."[31]

"The populace of Boston are regulated by their big men," writes an indignant protestant against the ratification by Massachusetts. "They have had a great fulsome parade at the ratification. The Convention ought to have adjourned from that seat of aristocratical influence. However, all these manoeuvres will not answer; they may serve to please children, but freemen will not so easily be gulled out of their liberties. Supposing they could procure a majority in thirteen conventions, would it be possible to put such a government into execution? . . .

[31] For all details of the Philadelphia procession, see F. Hopkinson, *An Account of the Grand Federal Procession* (Philadelphia, 1788). The letter quoted is from an appendix to this "Account."

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I would not be surprised if the people from Georgia to New Hampshire would rise and crush the real authors and promoters of this system of arbitrary power."[32] But instead of a great popular uprising against the new Constitution there came practically contemporaneously, as President Wilson has said, "an indiscriminate and almost blind worship of its principles. . . . The divine right of kings never ran a more prosperous course than did this unquestioned prerogative of the Constitution to receive universal homage."[33] Those who courted the people and those who despised the people joined in praise and prayer for the new Constitution. Franklin, who was no sentimentalist, wrote in one of his last and happiest essays, "A Comparison of the Conduct of the Ancient Jews and of the anti-Federalists,"

"I beg I may not be understood to infer that our general convention was divinely inspired when it formed the Federal Constitution merely because that Constitution has been unreasonably and vehemently opposed; yet I must vow I have so much faith in the general government of the world by Providence, that I can hardly conceive a transaction of such momentous importance to the welfare of millions now existing, and to exist in the posterity of a great nation should be suffered to pass without being in some degree influenced, guided and governed by that omnipotent, omnipresent and beneficial Ruler, in whom all inferior spirits live, and move, and have their being."[34]

And indeed to countless numbers of thinkers and unthinking alike the new Constitution became fraught with supernal wisdom and endowed with extraordinary intrinsic properties and potentialities. John Quincy Adams records that when the delegates from the Massachusetts ratification convention returned to Newburyport, "the mob huzza'd and one would have thought that every man from the adoption of the Constitution had acquired a sure expectancy of an independent fortune."[35] Crusty old Maclay, who had feared that the Constitution would "turn out

[32] *Maryland Journal*, March 4, 1788.
[33] Woodrow Wilson, *Congressional Government* (15th ed), 4.
[34] Franklin, Works (ed. Bigelow), ix, 439.
[35] Diary of John Quincy Adams, 94.

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the vilest of all traps that was ever set to ensnare the freedom of an unsuspecting people,"[36] complained with some justification that "it has been usual with declamatory gentlemen, in their praises of the present government, by way of contrast, to paint the state of the country under the old (Continental) congress, as if neither wood grew nor water ran in America before the happy adoption of the new Constitution."[37] One can imagine how Maclay would have squirmed at the rhetoric of Richard Bland Lee, who, after portraying to the house the humiliation abroad, the commercial and financial chaos and the languor of agriculture at home before the adoption of the Constitution, declared:

"Such was the situation of the United States, and to remedy these evils was the Constitution made. Has it not produced the intended effects! . . . I will only mention the stimulus which agriculture has received. In travelling through the various parts of the United States, I find fields, a few years ago, waste and uncultivated, filled with inhabitants and covered with harvests; new habitations reared, contentment in every face, plenty on every board, confidence is restored, and every man is safe under his own vine and his own fig tree, and there is none to make him afraid. To produce this effect was the intention of the Constitution, . . . and it has succeeded."[38]

In 1808 Josiah Quincy in an eloquent speech in the house on The Suspension of the Embargo warned the country against the attribution of commercial prosperity to so human an institution as the Constitution.

"We are but a young nation. The United States are scarcely yet hardened into the bone of manhood. The whole period of our national existence has been nothing else than a continued series of prosperity. The miseries of the Revolutionary war were but as the pangs of parturition. The experience of that period was of a nature not to be very useful after our nation had acquired an individual form and a manly constitutional charac-

[36] Maclay, *Journal of William Maclay* (1890), 75–6.
[37] Ibid; 411.
[38] *Annals of Congress*, 3d Cong., 261–2.

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ter. It is to be feared we have grown giddy with good fortune, attributing the greatness of our prosperity to our own wisdom, rather than to a course of events, and a guidance over which we had no influence. It is to be feared that we are now entering that school of adversity, the first blessing of which is to chastise an overweening conceit of ourselves. . . . ."[39]

Quincy's intimation that much of the popularity of the new government was in part really due to a wave of economic improvement that was merely coeval with and by no means wholly due to the constitutional system, had also been made more cynically almost twenty years before, when the new instrument was just going into effect, by Wolcott, who had ample opportunities for a thorough knowledge of both commercial and governmental affairs. "The affairs of this country," he wrote, "are so generally prosperous that *public management must be very bad to render the people very unhappy.*"[40] And in September of the same year (1790) he confided to his father that "we want men of political experience in congress, and to administer the government, but *when the general affairs of society are so prosperous, it must be a very bad administration which overturns a government.*"[41]

Just what were the economic results of the adoption of the Constitution is a question that must be left to the economists, but there can be little doubt that the recognition of the affiliations of the "propertyed" with the Constitutionalists was not in the least bashfully made, and that to the people the Constitution was the only guaranty of the safety of their property. A Massachusetts paper of 1787, an ardently Federalist organ, without the slighest diffidence, stated that "one of the first objects of the national government under the new Constitution, it is said, will be to provide funds for the payment of the national debt, and thereby to restore the credit of the United States, which has been so much impaired by the individual States. Every holder of a public security of any kind is, therefore, deeply

[39] Benton, *Abridgment of Debates of Congress*, iii, 700, quoted in part in Van Holst, Op. cit., i, 75.

[40] Gibbs, Op. cit., i, 46.

[41] Ibid., i., 58.

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interested in the cordial reception and speedy establishment of a vigorous continental government."[42] Likewise in the debate in the first congress on the duties on imports, Fisher Ames pointed out that "the present Constitution was dictated by commercial necessity more than any other cause" and urged that "the support of our agriculture, manufactures, navigation and fisheries are objects of very great moment."[43]

It is natural therefore that the Constitution should have a vital significance in its "critical period" not merely for the "moneyed few" but also for those among the great masses of the people who were not utterly propertyless, and that reverence for it should have become widespread at a very early period. Benjamin Goodhue, writing from Salem in 1795 of the attitude of the "Boston Jacobins" towards the Jay treaty, assures Wolcott that "although they may have received a degree of consolation, from being able to propagate the flame in New York and Philadelphia, yet their mortification must be great at not being able to get either the other great commercial towns in the State, or the agricultural interest to be infected with their mania. . . . You may depend on it that it will not be in the power, either of the inconsiderate or of the determinately vicious, to shake the great body, either of the merchants, or the yeomanry of our country, from their attachment or a reverence for their own government. They feel the sweets of peace."[44]

Fisher Ames' report is more significant. In July, 1795, he had been very despondent over the "inflammatory state" of Boston after the Jay treaty, fearing that "the prejudices and passions of the multitude are scarcely more deadly to public order than the theories of our philosophers."[45] But in the following summer after a trip from Dedham to Newport he wrote:

"I returned yesterday from a tour to Newport. . . . . At Providence, the anti-Federal party is very inconsiderable, and I was happy to see in that State, symptoms of a just pride

[42] *Mass. Gazette*, September 4, 1787.
[43] P. W. Ames, *The speeches of Fisher Ames in Congress* (Boston, 1871), 9, 10.
[44] Gibbs, Op. cit., i, 221; cf. Chauncey Goodrich's letter, ibid., i, 88.
[45] Ibid., i, 210.

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in their present state, as contrasted with their former turbulence and the folly of Boston. I made conversation at all the country taverns and I think the yeomanry are yet right. They say the men in the government know best what to do. . . . . As a speculative question the country folks do not pretend to understand it, their approbation is therefore not given; but their dislike of the proceedings in the seaports, is extorting it. Some opinions are general and well established; admiration of our Constitution and government, exultation in the happy effects manifested in the general prosperity, ... and a steady resolution to support the government. . . . . Now the contest lies between the mobbers and the government. . . . ."[46]

But on the other hand it would be manifestly incorrect to ascribe too much of the popular enthusiasm for the Constitution to the mere coincidence of national economic advancement alone. The reverential utterances of Franklin quoted above certainly do not pertain solely to the material welfare of "the posterity of a great nation." There is indeed no more important factor in the creation of the tradition of the Constitution than the very strong belief existing in countless thousands, as in Franklin, that it was the manifest destiny of the American nation to stand under the new Constitution, not merely as the summum bonum of political science but thereby as the herald of a new world-cleansing era that would speedily disperse the "rank vapors of this sin-worn mould." James Wilson told the Pennsylvania Convention that ratified the Constitution that,

"Government, indeed, may yet be considered to be in its infancy; and with all its various modifications, it has hitherto been the result of force, fraud or accident. For after six thousand years since the creation of the world, America now presents the first instance of a people assembled to weigh deliverately and calmly, and to decide leisurely and peaceably, upon the form of government by which they will bind themselves and their posterity."[47]

[46] Ibid., i, 229–30.
[47] *N. Y. Daily Advertiser*, December 3, 1787.

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David Ramsay, in his *History of the American Revolution* (1795), waxed still more eloquent over the new system, exclaiming,

"Citizens of the United States, you have a well-balanced Constitution established by general consent, which is an improvement on all republican forms of government heretofore established. It possesses the good qualities of monarchy but without its vices. The wisdom and stability of an aristocracy but without the insolence of hereditary masters. The freedom and independence of a popular assembly acquainted with the wants and wishes of the people, but without the capacity of doing those mischiefs which result from uncontrolled power in one assembly. . . . . You have the experience of nearly six thousand years to point out the rocks on which former republics have been dashed to pieces."[48]

These two extracts by no means exaggerate the general feeling as to the significance not only for America but for the whole world of "that glorious fabric of Republicanism, the Federal Constitution." The impression seemed general that liberty and virtue, in their flight from the old world were making one last desperate stand on the western shore of the Atlantic. "We anticipate the praise," said the *Connecticut Gazette*, "with which the new federal government will be viewed by the friends of liberty and mankind in Europe. The philosophers will no longer consider a republic as an impracticable form of government; and pious men of all denominations will thank God for having provided in our Federal Constitution an ark, for the preservation of the justice and liberties of the world."[49] The New Yorkers were regaled by one of their journals with even a brighter vision of the American mission:

"The cloud which gathers in the European hemisphere serves as a foil, to set off the luster of the prospect that opens upon America. While the ancient establishments of the world are rent with civil discord and national contention, this infant empire deliberately examines her present wants and weaknesses, in order

[48] David Ramsay, *Hist. of the Amer. Rev.* (Dublin, 1795), 634.
[49] *Conn. Gazette*, November 2, 1787.

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to provide for her future strength and glory. Thus the dotage of our parent continent is stained with wild ambition and phantastic pride, while the vigorous youth of the confederated states expands under the influence of reason and philosophy."[50]

Every great national moment whether of joy or sorrow was made the vehicle of new laudation of the Constitution, and every orator sought to find in it some new manifestation of the national genius, and to impress upon the people its significance for the whole of humanity. As Enos Hitchcock said in his Fourth of July oration at Providence in 1788,

"If from a vile assemblage of vagrants and rogues the wisest and most virtuous nation that ever existed deduced its origin, under the wise constitution and laws of Romulus—what may not be expected from an enlightened, virtuous and heroic people, who have the advantage of the wisdom and experience, under a constitution formed by their free suffrages and the combined wisdom of all those who have gone before them? . . . . What glorious prospects open to view when we contemplate the scope given to the human mind for exertion—the extension of commerce—the progress of science, agriculture, manufactures, and all the pleasing and useful arts of refined society, which naturally flow from independence and a government as just in its principles and firm in its texture as it is free in its formation. . . . . Behold the majesty of a free people, convened in awful simplicity to consult their safety and promote their happiness."[51]

[50] *N. Y. Packet*, October 2, 1787. Nor had the shrewd feuilletonist of the time lost the opportunity of pointing out to the Americans the advantages to be derived from the influx of immigrants that must ensue on the consummation of the great undertaking for the advancement of civilization. "Private letters from Europe mention that the oppressed and persecuted in every country look with great eagerness to the United States in the present awful crisis of her affairs. Should the new federal government be adopted thousands would embark immediately for America. Holland would pour in, with her merchants, a large quantity of cash among us. Germany and Ireland would send us colonies of cultivators of the earth, while England and Scotland would fill our towns and cities with industrious mechanics and manufacturers." (*N. Y. Daily Advertiser*, August 29, 1787).

[51] Enos Hitchcock, Oration, July 4, 1788, at the Request of the Inhabitants of Providence, 13–16.

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Nor is it difficult to understand the awe and thrill of the people at the highly imaginative recital year after year of those proceedings which had been kept practically secret by the framers. Simeon Baldwin's oration at New Haven in 1788 assured his audience that,

"Revolutions in government have in general been the tumultuous exchange of one tyrant for another, or the elevation of a few aspiring nobles upon the ruins of a better system. Never before has the collected wisdom of any nation been permitted quietly to deliberate and determine upon the form of government best adapted to the genius, views and circumstances of the citizens. Never before have the people of any nation been permitted, candidly to examine and then deliberately adopt or reject the Constitution proposed. For a moment turn your attention to that venerable body—examine the characters of those illustrious sages, eminent for political wisdom and unsullied virtue—see them unfolding the volumes of antiquity, and carefully examining the various systems of government, which different nations have experienced, and judiciously extracting the excellence of each—listen to the irresistible reasons which they urge—mark the peculiar amity which distingishes their debate—hear the mutual concessions of private interest to the general good, while they keep steadily in view the great object of their counsels, and then glory, Americans, in the singular unanimity of that illustrious assembly of patriots in the most finished form of government that ever blessed a nation."[52]

But Fourth of July orations were not the only opportunities for the beatification of the Constitution. The eulogies of national heroes were also panegyrics of their greatest creation. No one could underrate Washington's share in the establishment of the new government. The *New York Packet* had announced as early as October, 1787, that,

"George Washington, Esq., has already been destined by a thousand voices to fill the place of the first President of the United States, under the new form of government. While the

[52] Simeon Baldwin, Oration Pronounced before the Citizens of New Haven, July 4, 1788.

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deliverers of a nation in other countries have hewn out a way to power with the sword, or seized upon it by stratagems and fraud, our illustrious Hero peaceably retired to his farm after the war, from whence it is expected he will be called, by the suffrages of three millions of people, to govern that country by his wisdom (agreeably to fixed laws) which he had previously made free by his arms. Can Europe boast such a man? Or can the history of the world show an instance of such a voluntary compact between the *deliverer* and the *delivered* of any country, as will probably soon take place in the United States."[53]

In all these eulogies the Constitution shares the praise of its framers.

"The union of the country was in danger, and the evil was of too baneful a nature to admit of a partial or dilatory remedy. But how novel, how aspiring, was the hope of connecting, under one compact code of general jurisprudence, so many distinct sovereignties, each jealous of its independence, without impairing their respective authorities! The unbalanced bodies of the Confederacy had almost overcome the attracting power that restrained them; when the watchful guardian of his country's interests, the heart-uniting Washington, appeared, the political magnet in the center of discord, and reconciled and consolidated the clashing particles of the system in an indissoluble union of government."[54]

Nor was Hamilton's death allowed to pass without many a tribute to the Constitution. In the popular mind Hamilton had been one of the main constructive forces at the convention, though in reality his radical pro-centralization had been, as Professor Farrand well says, "praised but unsupported." According to a New York pastor,

"A prudent secrecy covers the transactions of that august assembly. But could the veil be drawn aside, you would hear the youth of thirty fascinating, with his eloquence, the collective wisdom of the States; and instructing the hoary patriot in the

[53] *N. Y. Packet*, October 2, 1787.

[54] Robert Treat Paine, Eulogy on Washington at . . . Newburyport, January 2, 1800, in *Eulogies and Orations on Washington*, 62–3.

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recondite science of government. You would have observed all the emotions of his manly heart occupying, in turn, his expressive features; and see, through the window of his breast, every anxiety, every impulse, every thought, directed to your happiness. The result is in your hands: it is your national existence."[55]

We have thus far considered, somewhat fragmentarily, what we may call the personal, the political, the economic and the nationalistic elements in the creation of the tradition of the Constitution. Before concluding our survey we must point out the influence of two great factors in society which by their very nature are calculated to crystallize and preserve, to amplify and ramify a national tradition. Reference has already been made to the association of Jeffersonianism by its enemies with anarchy, atheism, jacobinism and heresy of every kind. But the Federalists had been strongly supported by the clergy in the struggle for ratification itself, long before the alliance between the anti-French elements in church and state. "A minister of the gospel, through the medium of our paper," says a Federalist organ, "begs leave to ask, whether men can be serious in regard to the Christian religion, who can object to a government that is calculated to promote the glory of God, by establishing peace, order and justice in our country—and whether it would not be better for such men to renounce the Christian name, and to enter into society with the Shawanese or Mohawk Indians than to attempt to retain the blessings of religion and civilization with their licentious ideas of government."[56] The same paper a few days later reported that "the ministers and Christians of all denominations are now engaged in praying for it, and there is good reason to believe that no prayers have as yet been offered up against it."[57] Nor was the injunction of an ancient sage, "Pray for the welfare of the government, since but for the fear thereof men would swallow each other alive," hearkened to by Christians only, for, in the grand federal procession in Philadelphia,

[55] J. M. Mason, Oration commemorative of Hamilton, N. Y., July 31, 1804, 8.

[56] *New Haven Gazette* and *Conn. Magazine*, October 12, 1787; *N. Y. Daily Advertiser*, October 20, 1787.

[57] *New Haven Gazette* and *Conn. Magazine*, October 18, 1787.

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"the rabbi of the Jews locked in the arms of two ministers of the gospel was a delightful sight. There could not have been a more happy emblem contrived, of that section of the new Constitution, which opens all its powers and offices alike, not only to every sect of Christians but to worthy men of every religion."[58]

A clergy fairly unanimously in favor of the new Constitution exerted a profound influence in the formation of a sentiment of devotion to the Constitution. The Methodist Conference that met in New York in May, 1789, congratulated Washington in terms that spoke of "the most excellent Constitution of these States, which is at present the admiration of the world, and may in future become its great exemplar for imitation."[59] The election and other sermons of New England show how enthusiastically the church contributed to the worship of the Constitution, but it would be wearisome to quote them at length. Year after year it was preached that "behold, it hath pleased Him by whose special providence our empire was founded to unite a great people . . . . . in adopting a new Constitution in a manner unequalled by, nay without precedent among the nations of the earth."[60] Many preachers in their Federalist zeal went even further than mere abstract laudation of the Constitution. "May I be permitted to enquire," said Chandler Robbins in 1791, "can it be wise, can it be just, or politic to speak of our national government as a *foreign* jurisdiction? . . . . as though the interests of the federal government and those of the States were separate, at least, if not opposed to each other; than which no idea can be harbored more dangerous to our peace, or more untrue. . . . . Let us cautiously avoid every dangerous insinuation—every alarming expression, which can have no other effect than to . . . . weaken our government, destroy the public confidence, and, in the end, sap the foundations of that fair structure, which under God, has been raised

[58] From the letter appended to Hopkinson's *Account of the Grand Federal Procession*, July 4, 1788.

[59] E. S. Tipple, *The Heart of Asbury's Journal*, 280.

[60] Ammi Robbins, Election Sermon, Conn., May 14, 1789. (Hartford, 1789). 25.

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by American wisdom and valor."[61] The Constitution was to the preachers a refuge in "the howling wilderness of an almost national anarchy, where were pits, scorpions and fiery flying serpents,"[62] its adoption was "declarative of the superintendence of God" and its operation was responsible not merely for the growth of religion, but for the new plantations, cities, bridges, canals, manufactories, colleges, seminaries, public libraries, and even a new school of scientists."[63]

That much of this clerical admiration of the Constitution degenerated into a rabid hatred of the later anti-Federalism and a shameless use of the pulpit for political purposes is admitted.[64] A clever Republican lampoonist declared that if Dr. Timothy Dwight "would advocate the cause of the Church militant as strenuously as he has done the cause of Federalism triumphant —we should have turnpike roads to the New Jerusalem all paved with jasper and gold. . . . ."[65] But this aspect of the alliance between the forces of religion and the bitterest foes of Jefferson and his school does not concern us here. All that is relevant and significant in the present connection is that the clergy supported the Constitution as "the sanction of the liberties of the people" and the liberties of the Church, and in prayer and discourse they instilled into the people a sense of the intimate connection between divine government and constitutional progress and supremacy.

The lawyers were equally emphatic in their declarations of loyalty to the Constitution and equally influential in impressing the people with its significance and its promise. In the great federal processions it was always the gentlemen of the bar who

[61] Chandler Robbins, Election Sermon, Mass., May 25, 1791 (Boston, 1791), 46–7.

[62] John Smalley, Election Sermon, Conn., May 8, 1800 (Hartford, 1800), 35.

[63] See Nathaniel Emmons, Thanksgiving Day Sermon, Franklin, Mass., December 15, 1796, (Worcester, 1797,) 19–20.

[64] See A. E. Morse, *The Federalist Party in Mass. to the year 1800* (Princeton, 1909), 184–8 and appendix J for a valuable discussion of the political influence of the clergy in New England; also D. D. Addison, *The Clergy in American Life and Letters*, 181.

[65] *Federalism triumphant, . . .* A political farce in six acts, as performed at Hartford and New Haven, October, 1801 (1802), 7.

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solemnly bore aloft amidst the throngs which Burke had called "a nation of lawyers," the new Constitution. It was not until the famous case of Chisholm vs. Georgia that the juristic theory of the Constitution as the work of the whole people was clearly enunciated. This conception, enabling or causing the courts to give so deep a significance to the words of the Preamble, "We, the people," and to ignore completely the fact that this phrasing was the fortuitous solution by the convention's committee on style of a problem in rhetoric, and not the premeditated statement of a political principle[66] was thus stated by Chief Justice Jay:

"In the hurry of war, and in the warmth of mutual confidence they made a confederation of the States the basis of a general government. Experience disappointed the expectations they had formed from it; and then the people in their collective and national capacity, established their present Constitution. It is remarkable that in establishing it, the people exercised their own rights, and their own proper sovereignty, and conscious of the plentitude of it, they declared with becoming dignity, "We, the *people* of the United States, do ordain and establish this Constitution."[67]

But it was not so much in judicial decisions that the lawyers exerted great influence in the molding of popular reverence for the Constitution. The juristic theory of the Constitution was after all the possession of only a very limited class in the community. If the lawyers to any special degree stimulated the Volksgeist to enthusiasm for the new instrument of government it was through their political activity and through those now almost obsolete non-technical charges to the grand juries that were the great feature of the sittings of a court at the end of the eighteenth century, in the days when the judges made a "public entry" into the towns, sometimes even "amidst the ringing of bells and the roar of cannon."[68] The federal judges, travelling on circuit from one end of the United States to the other, in

[66] See Farrand, *The Framing of the Constitution*, 190, 191.
[67] Chisholm v. Georgia, 2 Dallas, 470–71.
[68] Van Santvoord, *Lives of the Chief Justices* (N. Y., 1854), 48.

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these charges preached what really amounted to awe-inspiring political sermons, often of the orthodox homiletical length, in which the Constitution, its uniqueness and its potentialities, were often the central theme. Chief Justice Jay, for instance, in his charges to the grand juries of New York, Connecticut, Massachusetts and New Hampshire in April and May, 1790, said:

"Providence has been pleased to bless the people of this country with more perfect opportunities of choosing and more effectual means of establishing than any other nation has hitherto enjoyed; and for the use we may make of these opportunities and of these means we shall be highly responsible to that Providence, as well as to mankind in general and to our own posterity in particular."[69]

Judge Iredell in his charge at Richmond in 1796 thus described the genesis of the Constitution:

"The voice of the Union disregarded—public debts not only unpaid but unprovided for; private as well as public credit at a very low ebb; commerce languishing; agriculture discouraged; measures of disunion every day adopting; an illiberal malignant jealousy taking place of rational and manly confidence, and the most melancholy symptoms prevailing for a speedy dissolution of the Union, or a disgraceful and ungovernable anarchy. The magnitude of the danger alarmed all considerate men, and by one of the greatest and most disinterested efforts ever made by public bodies, each making voluntary sacrifices to accomplish a magnanimous reformation, the present Constitution of the United States was formed and adopted."[70]

Nor were such charges confined to the federal courts alone. Washington wished sincerely that the "good example" of Judge Addison of the Pensylvania court of common pleas "in endeavoring to bring the people of the United States more acquainted with the laws and principles of their government"[71] were followed by others. Judge Addison charged in 1791 as follows:

[69] Jay, *Corr. and Public Papers* (ed. Johnston), iii, 338.
[70] McCree, *Life and Corr. of James Iredell*, ii, 484.
[71] Addison, *Reports* (Washington, 1800), Appendix, iv.

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"That a people, who have long subsisted in a national state, unassailed by calamity, should voluntarily sit down, and trace their progress from the first rudiments of society, dissolve every band that held them together, eradicate every prejudice, respectable from time and habit, and by the force of reason, enlightened by the speculation and experience of ages, establish a system of political freedom, is a spectacle reserved for the eighteenth century, reserved for America to set an example of to the nations of the earth, and worth the discovery of a new world to exhibit."[72]

And later he went to the root of the matter:

"The laws and Constitution of our government ought to be regarded with reverence. Man must have an idol. And our political idol ought to be our Constitution and laws. They, like the ark of the covenant among the Jews, ought to be sacred from all profane touch."[73]

And the grand jury usually responded that they were "convinced of the importance of the observations delivered in your charge, to men who have the happiness to live under a government of their choice," and believing that "the publication of such a charge . . . . will be highly beneficial to the citizens," unanimously requested a copy of the charge for the public press, and within a very few days the newspapers brought the wisdom and political learning of the Constitution to the fireside of every freeman for miles around.

At the end of a survey of the nature, the sources and the "transmission power" of the tradition of the Constitution we feel the wisdom of Anatole France's remark, through the lips of the old Abbé Coignard, that "popular government, like monarchy, rests on fiction and lives by expedients. It suffices that the fiction be accepted and the expedient happy." The fiction that the Constitution was the unanimous and deliberate political mandate of an inspired and all-inclusive democracy has been accepted by the people, and few will deny the happiness of the expedient. In the Federal Convention Nathaniel Gorham had asked, "Can it be supposed that this vast country including the

[72] Ibid., appendix 1.
[73] Ibid., appendix, 242.

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western territory will 150 years hence remain one nation?"[74] If we as yet show no signs of dissolution, may we not attribute it in part to that first decade when the American people, their lawyers, their merchants, their clergy, their farmers, their procession-loving mechanics, their conservatives, their radicals, their democrats and their reactionaries, were all for one reason or another espousing the cause of that Constitution the ratification of which had been the subject of so bitter and in so many cases so narrow a conflict? It is this fact that Van Holst overlooks in that long chapter on the "canonization of the Constitution," with its rumblings and mutterings against the "national fetish," the "chronic constitutional scruples of the minority" and the "a priori convictions of the masses of the people." "If the original strength of the Constitution," says Mr. Coudert, "was at the outset its merits, its maintenance was owing to its having become the subject of a cherished tradition based on sentiment rather than reason."[75] What the bases of the tradition were we have tried to show here. But it must be agreed that it was the tradition that kept the Constitution no "mere lawyer's document," but in the words of President Wilson, "the vehicle of a nation's life."

[74] Farrand, *Records of the Federal Convention*, ii, 221.
[75] F. R. Coudert, *Certainty and Justice* (N. Y., 1913), 24–25.

ADDENDUM

In note (12) add: O. G. Libby, *Political Factions in Washington's Administration*. Quar. Jr. Univ. of N. Dakota, iii, 293.

To note (20) add: A. B. Hart, *National Ideals Historically Traced*, 144.

To note (22) add: Cf. O. G. Libby, *Early Political Parties in the United States*, Quar. Jr. Univ. of N. Dakota, ii, 216.

To note (54) add: "The people he has saved from external tyranny," said George Minot in Boston, "suffer from the agitations of their own unsettled powers. The tree of liberty, which he has planted and so carefully guarded from the storms now flourishes beyond its strength: its lofty excrescences threaten to tear its less extended roots from the earth, and to prostrate it fruitless on the plain. But, he comes! In convention he presides over councils, as in war he had led to battle. The Constitution, like the rainbow after the flood, appears to us now just emerging from an overwhelming commotion; and we know the truth of the pledge from the sanction of his name. The production was worthy of its authors, and of the magnanimous people whom it was intended to establish. You adopt it, you cherish it, and you resolve to transmit it, with the name of Washington, to the latest generation, who shall prove their just claim to such an illustrious descent." (George Richard Minot, *Eulogy on Gen. Washington*, Boston, Jan. 9, 1800, *ibid.*, 22–23.)

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LEGISLATIVE NOTES AND REVIEWS

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Law Reform—New York. The purpose of this note is to give an outline of law reform in New York down to the presentation of the report of the statutory consolidation board recommending the repeal of the code of civil procedure and the substitution in lieu thereof of a civil practice act and rules.

Prior to 1909 there had been several reports of committees of the legislature, of the New York State Bar Association and the Association of the Bar of the City of New York, recommending either practice acts and rules, or simplification of the civil procedure on the lines of the English judicature act, in lieu of the code of civil procedure; but none of these committees was able to pass a single important bill, although some of them did prevent the passage of very many bad procedural bills promoted by persons with axes to grind. In 1909 the New York City Bar Association appointed a special committee to consider the simplification of the New York procedure. Cipriano Andrade, the introducer of the resolution (now a member of the New York State Bar Association committee to examine the practice act prepared by the board of statutory consolidation), was its first chairman. In 1911 it became the City Bar Association's standing committee on law reform, whose first chairman was Everett P. Wheeler, then and now the chairman of the American Bar Association committee to suggest remedies, etc. Its present chairman is George Gordon Battle. In civil procedural matters from 1910 to date it has at all times coöperated (in a sort of informal alliance) with the law reform committee of the New York State Bar Association, whose chairman from 1910 to 1914 was A. T. Clearwater, now president of that association.

This year Judge Clearwater was succeeded as chairman by Henry W. Taft. In every year since 1909 these committees have procured the passage of bills or the promulgation of court rules abating major archaisms of the civil procedure, or else have inspired state commissions to prepare bills which have passed abating procedural archaisms in such directions as a revision of the surrogates law (1914) and a New York

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City municipal court act (1915). The Massachusetts Bar Association (in alliance with the Boston Bar Association) and the New Jersey State Bar Association have successfully followed New York's example.

The New York City Bar Association committee on the simplification of the procedure published a preliminary report in the summer of 1909, and presented its final report (with 52 recommendations of which the association adopted 43) in December, 1909. In January, 1910, the joint bar association campaign began to procure their legislative enactment or promulgation as rules of court, and was continued until the presentation of the statutory consolidation board's report recommending a practice act, rules and forms in 1915.

In 1910 the legislature passed seven of the joint city and state bar association bills. Of these the (1) bill giving the surrogates courts statutory equity jurisdiction on accountings (2) the bill authorizing jury trial in the supreme court in the first instance in every surrogates proceeding where a constitutional right to trial by jury existed thereby abolishing statutory double trials in probate matters and (3) the bill shortening to three extra days the double time formerly allowed after the service of a pleading or other paper by mail, became laws. Bills (1) abolishing the statutory double trial and discretionary third trial in ejectment (2) authorizing the clerk of every court of record to draw and enter short form judgments whenever possible in lieu of long form judgments with unnecessary recitals which had to be drawn by the attorney (3) providing a local flat filing system in each county of New York City and (4) providing a local (but not necessarily flat) filing system for each county in the State, also requiring that the opinion of the appellate division should for the purpose of an appeal to the court of appeals be deemed a part of the record, were all vetoed. In the fall of 1910 the supreme court justices promulgated as a general rule of practice a part of the committee's recommendation that opinions should be deemed a part of the record on appeal, also the recommendation for a general compulsory exchange of contested motion papers when moving papers were served ten days before the return day of a motion, also the recommendation for a proper index of and headnoting each page of a case on appeal or appeal papers. In October, 1910, the county clerk of New York County voluntarily adopted a local flat filing system, which was soon made compulsory by a local rule promulgated by the appellate division.

In 1911 the joint bar association campaign continued. Double trials in ejectment were abolished by statute and a statutory flat filing

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system for New York County was introduced, overcoming two of the vetoes of 1910. A short form order bill authorizing the court to enter its own orders on a short printed form or endorsement on the motion papers in lieu of entering long form orders after notice of settlement was enacted. Judicial decisions abated a procedural evil in relation to demurrers. Omnibus motions for general, alternative, or inconsistent relief were introduced; the abuses relating to the common law lack of jurisdiction of suits by or against a foreign executor were abolished, and in criminal cases the testimony was required to be printed in question and answer in lieu of the narrative form.

In 1912 a bill was enacted doing away with Baron Parke's harmless error doctrine of 1835 as a ground for granting a new trial as matter of right in all jury cases (and even in many equity cases), reëstablishing the equity practice of one trial of the facts and one course of appeal in all equity suits and so far as it could constitutionally be done in jury cases. (In the fall of 1813 a rule of practice was promulgated requiring the case on appeal on a question of fact to be in haec verba, or question and answer, in lieu of the former narrative form. In April 1914, the court of appeals adopted this rule in capital cases.) Some local archaisms in regard to the form of orders of reversal were abolished in 1912 and the statutory consolidation board was authorized to report a plan for the classification, consolidation and simplification of the civil practice.

In 1913 a bill making the opinion of the appellate division a part of the record on appeals was enacted, overcoming the major part of the third of the vetoes of 1910. A number of local procedural abuses were abated. The time of the statutory consolidation board to report was extended, and it was authorized to prepare and present to the legislature a practice act, rules of court and short forms for pleadings and other legal papers used in litigation, to simplify and expedite the present civil procedure so as to provide so far as practicable for one form of action, one trial of the facts and one course of appeal.

In 1914 and 1915 owing to the forthcoming report of the statutory consolidation board, the civil procedural changes enacted or promulgated were generally of but local or state interest. In 1914 a revision of the surrogates law was enacted through the efforts of a state commission composed of representative surrogates.

In 1915 a modern and efficient municipal court act for New York City was enacted through the efforts of a state commission composed in part of leading municipal court justices. An act abolishing many

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of the abuses of expert witnesses in criminal cases or in habeas corpus proceedings by providing for the appointment of disinterested insanity experts (Laws 1915, Chap. 295), was passed through the persistence and activity of a committee headed by President Clearwater of the State Bar Association.

In 1915 the Association of the Bar of the City of New York approved the unanimous report of its law reform committee for the reform of the criminal procedure on the lines suggested by the decisions of the supreme court of the United States and the modern English and federal criminal practice. During 1914–1915, the law reform committee of the City Bar Association made a nation-wide investigation of the public defender project and reported against it.

As these lines are written, the complete report of the statutory consolidation board recommending a short practice act and court rules in lieu of the code of civil procedure, is at hand. The writer trusts it will be enacted next year.

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Legislation of 1914 Affecting Nominations and Elections. The small amount of statute making in the few States whose legislatures were in session in 1914 indicates no new tendencies in nomination and election practices. Most of the legislation is concerned with modifications of the direct primary. At the same time the marked tendency toward the "short ballot" noticed last year continues, and "corrupt practices" laws increase in favor. Some of the more specific changes may be considered as follows:

Equal suffrage. Suffrage qualifications furnish the starting point in considering election laws. In this respect the movement for woman suffrage made decided gains during the year. Montana and Nevada adopted constitutional amendments admitting women to the electorate; while the Massachusetts (Laws 1914, p. 1055) legislature passed resolutions to submit like amendments to the voters in the respective States in 1915, after the legislatures of 1915 have ratified the proposals. New York, in changes in the charters of the cities of Jamestown (Laws 1914, p. 785) and Norwich (Laws 1914, p. 87), provides that women who pay taxes may vote in all elections, in those cities, in which only tax payers participate. The tendency toward equal political rights for women is further illustrated by the amendment to the Louisiana constitution (Laws 1914, p. 251), which makes women eligible to hold office

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in municipalities or in public educational, charitable or correctional institutions.

Nominations. Massachusetts (Laws 1914, p. 959) adopted by referendum the "open" primary. New York (Laws 1914, p. 714) makes several changes in its general primary law, viz., party emblems are abolished in the primaries; a person nominated by the primary must accept the nomination, his alternative being to decline in advance of the primary in the manner prescribed by law; delegates and alternates to the national conventions are to be chosen directly in the primaries, apparently without instructions. Rhode Island (Laws 1914, pp. 44, 45, 49), while making a number of changes in its law regulating the party caucus, still hesitates to adopt the direct primary; indeed in a nominating law for some of the large cities (Laws 1914, pp. 68 ff.), the provisions regarding eligibility for participation in the caucus will operate to increase the control of the party machinery over the party activities. Virginia's new primary law (Laws 1914, p. 514) doesn't go very far in the direction of state control of parties. In the first place it is optional; secondly the primary officials, though appointed by election boards, must be members of the respective parties; thirdly, one who would participate in any party's primary must have voted for that party's nominees in the last election or must declare his intention of supporting the party in the future, and in addition must not be "disqualified by reason of other requirements in the law of the party to which he belongs;" and finally each candidate must comply with the rules and regulations of the proper committee of his party, besides filing with the proper office a declaration of candidacy accompanied by a petition and filing fee amounting to two per cent of the salary of the office sought or one dollar where no salary is attached to the office. The date for the general primary is the first Tuesday in August, and if there is only one candidate for an office then no primary is held for that office. Mississippi (Laws 1914, p. 194) adopts the second primary in the nominations for congressmen; if no candidate in the first primary (which is held on the third Tuesday in August) receives a majority the two highest stand three weeks later in a second primary. Mississippi, in bringing the election of United States senator within the operation of its nomination laws, set the primary at the time of the congressional election next preceding the general election at which a senator is to be chosen, i.e., a two year campaign period. Louisiana (Laws 1914, p. 519) sets the senatorial primary sixty to seventy days before the election. The same State (Laws 1914, p. 460), in its law for commission-governed

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cities provides that nominations in such cities shall be under the general primary laws, i.e., partisan, the expense to be borne by the parties. In Boston (Mass. Laws 1914, p. 760), nomination papers for mayor need contain only three thousand signatures instead of five thousand as heretofore, and for councilmen and school committeemen the reduction is from five thousand to two thousand. Louisiana (Laws 1914, p. 120) takes care of the Progressives by authorizing nominations by any party which polled ten per cent of the vote in the last presidential election.

Elections. The following States made the necessary changes in their laws to accommodate direct election of United States senators: Rhode Island (Laws 1914, pp. 40, 44, 65, 76), Maryland (Laws 1914, pp. 790, 1323, 1337), Louisiana (Laws 1914, p. 471), Mississippi (Laws 1914, p. 191) and California (by constitutional amendment). Generally speaking nomination and election are to be at the same time and in the same manner as for congressmen, vacancies to be filled temporarily by appointment by the governor.

In Georgia (Laws 1914, p. 47) the time of holding the general election for state and county officers is changed from the first Wednesday in October to the first Tuesday after the first Monday in November. Boston's annual city election is changed from January to December, i.e., the sixth Tuesday after the state elections (Mass. Laws 1914, p. 760).

A few changes may be noted respecting ballots. In New Jersey (Laws 1914, pp. 194, 365), sample ballots are to be mailed every voter on the Wednesday preceding every general or special election, those for referendum measures to be accompanied by such portion of the statute or constitution as is necessary to indicate to the voter the relation of the proposed change to the existing law. Louisiana (Laws 1914, pp. 148, 547) adds some safeguards with respect to voting booths, provides that numbered ballots are not to be handed to electors in numerical order or in such way as to tend to violate the secrecy of the ballot, and prohibits independent candidates from using the names of political parties to designate their candidacies.

Rotation of names and preferential voting were both included in the city manager plan passed by New York legislature (Laws 1914, p. 1659) for the city of Olean but rejected by the voters of that city. Preferential voting, however gets encouragement in New Jersey (Laws 1914, p. 170), which adopts it in an amendment to its commission-government law. Nominations are by petition only, and in the election the voter may express his first, second, third and "other choices." If no

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candidate receives a majority of first choice votes, then all the choices are added together and the highest resulting number decides.

The short ballot made some headway during the year, particularly in the matter of increasing the terms of office, e.g., Georgia (Laws 1914, p. 43), which changes all county offices from two to four year terms; Virginia (Laws 1914, p. 168), which in all three of its plans for city government makes the terms of officers four years instead of one and two as heretofore; New Jersey (Laws 1914, pp. 66, 106, 107), where the terms of various officers in cities of the fourth class are increased from one to three years. New York (Laws 1914, p. 1883), in its general law for the organization of cities provides six different plans in all of which only mayor and councilmen are elected. Contrary to the short ballot principle is the action of Georgia (Laws 1914, Part iii, Title 1), which in many instances adheres to the short term—one or two years—for city officers, and that of Mississippi (Laws 1914, p. 522), which by constitutional amendment abandons the plan of appointing judges of the supreme court by the governor and instead provides for election directly by districts. It is to be noted however that the six judges are to serve for eight years and not all are to be elected at one time.

The recall is adopted by constitutional amendment in Louisiana, Kansas and North Dakota. The Louisiana law (Laws 1914, p. 575) affects all state, district, parish and municipal offices, except judges. The recall ballot contains two separate items; the voters pass on the question of recalling the officer and at the same time vote for candidates for the anticipated vacancy. A majority vote is necessary to recall or to elect, but in the latter first and second choices are permitted. Mississippi (Laws 1914, p. 203) adopts for cities an interesting variation of the usual recall procedure. An officer impeached by a recall petition signed by twenty-five electors may resign, or the "municipal authorities" may remove him, or a recall election may be held within sixty days. Since nothing is said about the succession it may be assumed that the recall simply creates a vacancy to be filled in the regular manner. If the recall election fails the officer at whom it was directed cannot be again subjected to recall proceedings during the term of his office.

Corrupt practices. In connection with its optional primary law Virginia (Laws 1914, p. 514) makes provision against corrupt practices. Expenditures are not permitted except for certain purposes, e.g., traveling, advertising, postage, headquarters, etc., and in amount for any one candidate may not be more than fifteen cents for every vote cast

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by that candidate's party for the candidate receiving the largest vote at the last gubernatorial election in the political subdivision for which the primary is held. In legislative districts where there are more than six candidates to be elected the limit is 40 per cent of the salary attached to the office. Statements of expenditures must be filed within twenty days after the primary. Paid advertisements of candidacy in newspapers must be so marked. Bribery, selling votes, and making promises to gain support are prohibited. Penalties vary for different offenses but the maximum is five hundred dollars fine and disqualification from holding office for five years. Massachusetts (Laws 1914, p. 937) strengthens its law in several respects. Corrupt practices by the candidate are more explicitly defined and include violation by himself or another of the provisions regarding limitations on expenditures, making false returns, bribing a voter directly or indirectly, aiding illegal voting, obstructing or delaying a voter or interfering with an election officer, altering, defacing, or destroying ballots, tampering with or injuring voting machines or ballot boxes, or attempting the same. The limit on expenditures for any one candidate under the previously existing statutes was twenty-five dollars for each thousand of the voters qualified to vote for the office concerned, and though any candidate could spend one hundred and fifty dollars, the maximum was five thousand dollars for both primary and election. The changed law provides a schedule for both primary and election for the various offices; e.g., candidates for United States senator or for governor may spend twenty-five hundred dollars in the primary and five thousand in the election, candidates for minor state offices may spend lesser amounts the smallest being for representatives where the limit is one hundred dollars for the primary and the same amount for the election. Candidates for other offices may spend one hundred dollars for the primary or election, or twenty dollars per thousand voters up to a limit of fifteen hundred dollars in the primary and three thousand dollars in the election. Nobody is prohibited from working for a candidate and paying his own expenses, but persons not acting under the authority of a party committee or a candidate are not permitted to receive or expend money in behalf of a candidate. The enforcement procedure is somewhat stiffened and the penalty is increased by the addition of disfranchisement for three years to the existing disqualification from holding office for a like period. The statute excepts from its operation town offices in towns of less than ten thousand inhabitants. Louisiana (Laws 1914, p. 547) enacts that employees of the State, parish, municipal or fed-

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eral government are not to act as election officials during their terms nor until six months after they leave their offices. On the other hand, persons elected to office are not to appoint election officials to positions in the State, parish or municipal governments until nine months after the election. Wards or precincts having less than twenty voters are not affected by the act. In Mississippi (Laws 1914, p. 107) bank officers and stockholders are prohibited from contributing directly or indirectly to the campaign expenses of any candidate for bank examiner. In New York (Laws 1914, p. 216), members of the commission which administers the workmen's compensation law are not permitted to serve on or under any committee of a political party.

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Legislation of 1915 Concerning Nominations and Elections. The most striking features of the development of election laws in 1915 are the extension of the presidential preference primary to a number of States; the adoption by California of a general non-partisan election law; and the vast amount of tinkering with primary laws. In addition it may be noted that certain new features are gaining ground, e.g., registration by the card system; voting by mail and other forms of absentee voting; and rotation of names on ballots. The changes, classified in the various fields are discussed more in detail in the following paragraphs.

Qualifications for voting. The question of extending the right to vote to women is to be submitted to the voters of New Jersey on October 19, 1915, a resolution passed by the legislature in 1914 having been again passed. Woman suffrage will also be submitted to the voters in New York, Pennsylvania, and Massachusetts at the regular election in 1915. The constitutional amendments passed by the legislatures of Arkansas (Laws 1915, p. 1492) and South Dakota (Laws 1915, p. 46), are to be submitted to a referendum at the general elections of 1916. At the same time in Washington the voters will pass upon a constitutional amendment limiting the right to participate in bond elections to to those who, in addition to being otherwise qualified, own property assessed for taxation upon which the tax has been paid within a year (Laws 1915, p. 352).

Registration of voters. In this field the tendency seems to be toward adopting a permanent register, and therefore toward keeping the register on cards instead of in books. Montana (Laws 1915, p. 263 ff.), Nebraska (Laws 1915, p. 382 ff.), and Oregon (Laws 1915, p. 299 ff.),

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adopt the latter system, while Indiana (Laws 1915, p. 530 ff.) and Washington (Laws 1915, p. 33 ff.), though providing for a permanent register stick to the registration book. Under these laws permanent registration offices are provided, registration is possible at all times except just preceding elections, and the voter is not required to re-register unless he changes his residence or otherwise invalidates his earlier registration, except in Nebraska and Washington where a new registration occurs every four years.

Nominations. New direct primary laws were adopted by Nevada (Laws 1915, p. 453 ff.), North Carolina (Laws 1915, p. 154 ff.), West Virginia, and South Carolina (Laws 1915, pp. 81 ff. and 164 ff.). Vermont (Laws 1915, p. 58 ff.) submits its new primary law to a referendum in the spring of 1916, but in any event it is to go into effect in 1927. The first four of these are of the "closed" type while the Vermont primary is "open." The Nevada law provides only for direct election of delegates to county and state conventions which in turn nominate candidates for public office. It merely brings party activities within the view of the law. The primary is held in August and the conventions in September in anticipation of November elections. In North Carolina the general primary is held on the first Saturday in June, in South Carolina the last Tuesday in August, and in Vermont on the second Tuesday in September. In both North Carolina and South Carolina a majority vote is required to nominate and if no candidate receives a majority a second primary is held later in which the two highest candidates stand. In South Carolina in case of a tie in the second primary, a third primary is to be held. In North Carolina the second primary may be dispensed with if the candidate standing second on the list so desires. Indiana (Laws 1915, p. 359 ff.) and South Dakota (Laws 1915, p. 498 ff.), revise their primary laws. Both are of the "closed" type, in Indiana held in March and in South Dakota in June. Arizona (Laws 1915, p. 89 ff.) amends its primary law, changing from "open" to "closed" primary. "Declarations of candidacy" are becoming popular as substitutes for candidacy by petition in the primary. Indiana (Laws 1915, p. 365), Oregon (Laws 1915, p. 124), Kansas (Laws 1915, p. 252), and North Carolina (Laws 1915, pp. 154 ff.), provide for this method; declarations must be accompanied by a filing fee varying in amount from fifty cents or one dollar up to one hundred and fifty dollars, according to the importance of the office. In Oregon and Kansas the declaration of candidacy is alternative with the petition method; in the other two States it is the

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only method. South Dakota and Vermont in the acts mentioned above stick to candidacy by petition in the primaries. A tendency to eliminate entirely from the election candidates who fail of nomination in the primary is apparent in the acts passed by Nebraska (Laws 1915, p. 103) and New Jersey (Laws 1915, p. 155), prohibiting a person who has been an unsuccessful candidate at a primary from becoming a candidate by petition for the same office at the subsequent general election. Likewise in the North Carolina primary law referred to above it is provided that candidates in the primary must pledge themselves to abide by the results of the primary. The method of drawing up a party platform under the direct primary has occasioned some perplexity. Indiana in its revised law mentioned above entrusts this duty to state conventions made up of delegates elected at the primaries. In the South Dakota act previously mentioned the provision is that delegates to a state convention acting with the candidates and the state central committee of each party draw up the platform. If the Vermont act goes into effect the platform will be formulated at a meeting of candidates for state offices, senators and representatives. It is Washington, however, which proposes an entirely new method of dealing with this problem (Laws 1915, p. 174 ff.). In May of each election year caucuses are held to elect delegates to the county conventions to be held in the same month, which in turn choose delegates to a state convention to be held in June. The state convention of each party draws up a statement of "its political principles and its legislative program," which must be accepted and endorsed generally by every person who runs as a candidate in that party's primary in the following September.

Presidential preference primaries are adopted in six States. In Oregon (Laws 1915, p. 348) and South Dakota (Laws 1915, p. 498), delegates and alternates to the national conventions are chosen in the primaries but are not required to pledge themselves to support any particular candidate for president, nor, in Oregon, is the preferential vote (taken at the same time) on president and vice-president more than advisory to the delegates. In Ohio (Laws 1915, pp. 543, 545), the candidates for delegate and alternate declare their first and second choice among the candidates for president and these are printed on the ballots. The preferential vote in the same primary is not binding on the delegates. In California (Laws 1915, p. 279, 281), candidates for delegates have the option of stating their preferences. Delegates select their own alternates. This is also the method of selecting alternates in Minnesota (Laws 1915, p. 508). In North Carolina (Laws 1915,

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p. 155), the results of the preferential primaries in the districts bind the delegates from the districts, while the result in the State binds the delegates at large. In Indiana (Laws 1915, p. 367, 378, 379) and Vermont (Laws 1915, p. 67, to be submitted to referendum in 1916), while the delegates and alternates are to be chosen by state conventions, presidential primaries are to be held the results of which in the former State are binding if a candidate receives a majority of the votes, and in the latter only advisory.

Second choice voting is adopted by Indiana (Laws 1915, pp. 372, 377), in its revised primary law. Minnesota, however, abandons this system after four years trial (Laws 1915, p. 223).

Rotation of names on the ballot is provided in the following States: North Carolina (Laws 1915, p. 154 ff.) in its primary law; Vermont (Laws 1915, p. 58 ff. to be submitted to referendum in 1916) in its primary law (applies to candidates for governor only); Indiana (Laws 1915, p. 368) in its primary law (applies if more than four candidates for one office); Nebraska (Laws 1915, p. 93) for all elections in counties of 50,000 or more (Douglas and Lancaster counties only are affected).

Non-partisan elections are adopted by Nebraska (Laws 1915, p. 543) for school officers only, and by South Dakota (Laws 1915, p. 361) for judges of the supreme and circuit courts. But the most sweeping change in this respect is that proposed in California (Laws 1915, pp. 272, 285, 844, 846) where, unless the acts of the legislature are defeated in the special referendum election to be held October 26, 1915, all state officers including members of the assembly will be nominated in non-partisan primaries and elected without legal recognition of their party affiliations. Since county and city officers and judges are already elected in California in this manner, that State intends to recognize partisanship only for candidates for United States senator, representatives in congress, presidential electors, and delegates to national party conventions.

Elections. Provision for directly electing United States senators is adopted in the following States: Indiana (Laws 1915, p. 13,), Maine (Laws 1915, p. 36), Montana (Laws 1915, p. 281), Nevada (Laws 1915, p. 85), New Jersey (Laws 1915, p. 566 ff.), New Mexico (Laws 1915, p. 39), North Dakota (Laws 1915, pp. 192, 193), South Dakota (Laws 1915, p. 367), Vermont (Laws 1915, p. 70 ff.) and Washington (Laws 1915, p. 232). The only variation in procedure is in respect to filling vacancies. In most cases temporary vacancies are filled by appointment by the governor until the next general election is held. In Mon-

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tana a special election is called, the governor meanwhile filling the vacancy, but in Maine and Washington the vacancy can only be filled by a special election.

Absentee voting gains favor. Four States, Montana (Laws 1915, p. 241 ff,), Oregon (Laws 1915, p. 307), Vermont (Laws 1915, p. 4) and Washington (Laws 1915, p. 691), are added to the list of States which permit a person who is unavoidably absent from his county on election day to vote in another county. In the first of these voting is by mail, in the latter three the elector votes at the polling place in the precinct where he happens to be and is therefore limited to an expression of his choice on state and district officers only.

Arkansas (Laws 1915, p. 402) lines up with the majority of the States by changing the date of its general election from the second Tuesday in September to the first Tuesday after the first Monday in November. Nevada (Laws 1915, p. 463 ff.) revises and codifies its general election laws. Kansas (Laws 1915, p. 264) numbers each one of its seven supreme court justices and requires candidates for these positions to run for a particular number (e.g., Judge No. 1, Judge No. 2, etc.) in both primary and election. Connecticut (Laws 1915, p. 2087) attempts to make "split" voting difficult by requiring such voting to be for each candidate separately, i.e., ballots are not marked in the party circle and also for individual candidates of other parties. But if the latter practice is followed the intentions of the voter are to be carried out, which leaves the matter about as it was.

The Recall is adopted by New Jersey (Laws 1915, p. 622 ff.) for commission-governed cities. The petition for the recall must carry signatures of 25 per cent of the electors. An interesting variation from the ordinary recall procedure is the provision permitting the officer against whom charges are filed to resign within three days; but assuming that he has resigned unless within fifteen days he files a petition to contest the recall. A majority vote is necessary to recall an officer. Some other changes in recall procedure are as follows: In Washington (Laws 1915, p. 197 ff.), recall petitions may be signed at the office of the registration officer, and more careful checking of signatures is required. Nebraska (Laws 1915, p. 212) reduces the percentage of voters on recall petitions from twenty-five to fifteen for the city of South Omaha. Nebraska (Laws 1915, p. 211) also permits removal proceedings before the district court to be initiated by twenty freeholders of a city instead of by the city officials only.

Corrupt practices. Changes in corrupt practice laws were made in

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Indiana (Laws 1915, p. 359), North Carolina (Laws 1915, p. 157) and Vermont (Laws 1915 p. 66—subject to referendum in 1916) in connection with the primary laws enacted in those States. Kansas (Laws 1915, pp. 179, 266–267), Nevada (Laws 1915, pp. 82, 376), New Hampshire (Laws 1915, p. 234), Nebraska (Laws 1915, p. 105) and Ohio (Laws 1915, p. 350) modify their corrupt practice laws, usually strengthening them by making them more definite. The amount of campaign expenditures seems to occasion the most concern, and in this respect there is a tendency to raise the limit.

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Legislative Investigations Authorized. A special commission in Illinois will continue the work of the commission provided for in 1913 to revise the building laws of the State.

A new efficiency and economy commission consisting of four senators and four representatives was provided for in Illinois to continue the work of the former commission in preparing "a comprehensive survey of all public officers and authorities" to investigate the efficiency of all organizations and administration and to make recommendations and prepare plans for the consolidation, coördination and reorganization of such public bodies. Illinois also provided for a special commission to investigate the causes for the spread of the foot and mouth disease.

Another investigation in Illinois will be on the subject of the operation of state pension laws including the operation of similar laws in other States and countries. The subject of home-finding institutions will also be investigated in Illinois by a special committee.

Unemployment will be further investigated in Illinois continuing the work of a former commission.

Minnesota provided for a commission on interstate drainage in conjunction with a similar commission from the State of Iowa.

Michigan created a commission to investigate the existing system of public care and relief of poor persons.

Massachusetts provided for several investigations by special commissions and by administrative authorities.

The highway commission will investigate the subject of lights on motor vehicles. The health department will report upon the question of reimbursing the cities and towns for hospital care of tuberculous persons. The board of gas and electric light commissioners are directed to report on automatic means of shutting off gas from buildings

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in case of fire, and on the inspection and testing of gas meters and in the London sliding scale of charges. The secretary of the commonwealth and the attorney-general report upon the feasibility and desirability of legislation providing for absent voting. The commission on probation will report upon the administration of the juvenile law. The public service commission is directed to make a report on the expediency of legislation relating to extension telephone and telephone charges.

The Massachusetts highway commission will report on highway construction relative to the safety of horses and horse-drawn vehicles. A special commission appointed by the governor is directed to report upon the subject of military education for boys and of creating a militia reserve. Another special commission will revise and codify the laws relating to highways. A third special commission in Massachusetts will investigate and report as to the advisability of changes in the laws relative to taxation and to draft bills carrying out their recommendations.

A special commission to be known as the terminal commission will consider the improvement of the transportation of freight in the metropolitan districts.

The large number of investigations provided for in Massachusetts caused the legislature to pass an act to provide that whenever such commissions are created, they shall report their findings together with drafts of bills.

Delaware provided for a commission to investigate the sale of milk in the State of Delaware and another commission to investigate the need of education in the agricultural, industrial, home and commercial occupations. A joint commission with the State of New Jersey will consider modifications of the laws relating to the taking of fish in the Delaware River.

Vermont provided for a commission to report in detail upon the question of conservation of flood waters. The commission is to receive propositions for the construction of storage reservoirs to be submitted to the next general assembly. Vermont also provided for the revision of the public statutes by a commissioner to be appointed by the justices of the supreme court. A special commission in Vermont will report upon the system of courts. This commission is to consist of two lawyers and three laymen. A revision of the rules of the senate and house was also entrusted to a special commission consisting of the president and secretary of the senate and the speaker and clerk of the house.

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Utah provided for a commission to investigate provisions for the feeble-minded. Utah also provided for a commission to report on the subject of employer's liability and another commission to be known as the irrigation and water-rights commission to make an investigation with respect to irrigation and water-rights and to study the irrigation and water-right laws of other States.

Rhode Island created a commission of agricultural inquiry to inquire into the agricultural resources of the State and to recommend such legislation as may be necessary to encourage and assist agriculture. The commission created in 1914 to report on the condition, welfare and industrial opportunities of immigrants and aliens, was extended to January, 1916.

Pennsylvania provided for the codification of the laws relating to decedent estates and also directed the legislative reference bureau to continue its codification of the laws of the State. A commission was provided for in Pennsylvania to investigate the increase in the cost of anthracite coal alleged to be due to the tax imposed thereon. In Pennsylvania the governor, attorney-general and auditor-general are constituted a commission to be known as the economy and efficiency commission to continue the investigation of the administration of all state departments and institutions. The commission on the recording of deeds, mortgages and transfers was continued until the next session. A joint committee of the senate and house of representatives in Pennsylvania will report on the methods of legislation particularly relating to legislation concerning government of cities, boroughs and townships.

New Jersey provided for a commission to revise, simplify, arrange and consolidate the primary and election laws of the State. Another commission will investigate the question of pensions for officers and municipal employees. The committees on highways of the senate and house of New Jersey were directed to report at the next session a codification and revision of the laws relating to the improvement of public roads with state aid.

Indiana provided for a special commission to report on the subject of taxation. Another committee will report on mothers' pensions. The governor has appointed an unofficial commission to investigate the subject of the care of mental defectives. Separate commissions will revise the laws relating to public health and mining.

California provided for an investigation of taxation and of unemployment. California also provided for a commission to report on the subject of rural credits and colonization.

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Idaho provided a commission to investigate the wages of women and minors.

New York authorized an investigation of taxation by a special commission.

Wisconsin created a commission to review laws relating to public lands, including forest lands, and to submit to the next legislature a bill providing for eliminating the inconsistencies in such statutes, bringing them into harmony with the decisions of the supreme court and providing for the efficient administration of such lands.

Special Municipal Corporations. In a former number of the REVIEW (November, 1914) a classified list, amplified by a brief description, was given of the special municipal corporations which had been created by legislative enactment during 1913. The utilization of this convenient and flexible agency for the promotion of public enterprises is so manifest that it is not surprising to discover that the legislative year, 1915, has witnessed a large number of fresh creations, although the most notable characteristics of this important political tendency, which has now fully established itself as a public habit, is in the multiplicity rather than the diversity of the corporations created. The traditional types predominate, although two or three new types, analogous in structure, but anomolous in purpose and design have made their appearance. An analysis of the purposes of these rapidly multiplying corporations supplies unequivocal evidence of the growing popularity of public ownership of service supplying utilities, and the practical expression of the gregarious and civic instincts. These corporations are of two general classes: Specific creations organized by special acts, and those authorized by general law, permissive in character. An examination of the statutes of 32 states and political jurisdictions discloses the fact that 36 general laws have been passed authorizing the creation of special municipal corporations, while 50 districts were created by special acts. Among the prevailing types, the list includes districts designed to reclaim swamp and arid lands, to facilitate the general diffusion of knowledge, to provide for the extinction of fires, to supply water for domestic, manufacturing and other purposes, to provide for the erection and maintenance of bridges, to construct and maintain roads, to prevent the encroachment of the sea on tide water lands, to provide for the disposition of sewage, to install lighting systems, to control floods and regulate rivers, to eradicate horticultural pests, and to suppress tuberculosis. Only two new types have appeared. In

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Arizona and Nebraska the creation of electrical districts for the development and supply of heat and light, and in Idaho land improvement districts to clear land of natural growths, were authorized.

Irrigation Districts. A general law authorizing the organization of irrigation districts, not dissimilar to the prevailing type in the arid states, was enacted in Arizona.[1] Idaho conferred authority on irrigation districts to construct and operate electric power plants, transmission lines, and to maintain machinery for pumping water for irrigation and domestic use and to sell any surplus electric power.[2]

Levee and Drainage Districts. Alabama, Delaware, Indiana, Montana and Oregon authorized the creation of levee and drainage districts of the approved type.[3] Wisconsin authorized the creation of subdrainage districts within the limits of larger districts where the owners desire more thorough drainage.[4] In Texas, the county commissioners are authorized to establish levee improvement districts on petition of a majority of the landowners affected.[5]

Flood and River Control Districts. The unparalleled floods throughout the middle west during 1913 led to the passage of four flood control laws in Indiana, the efforts of the flood control commission to secure a general act applicable to the whole State having encountered too much opposition to permit its passage. One of these acts applies to the city of Indianapolis, a second to the city of Peru and other cities of the fifth class, a third to the city of Fort Wayne and Allen County, and a fourth to cities of the 3d, 4th and 5th classes. In Indianapolis flood control works are instituted and controlled by the board of works, the plans being taken on recommendation of an engineer appointed by them. The assessments for construction are apportioned by imposing 10 per cent of the cost on the lands directly benefitted, 45 per cent on Marion County, and 45 per cent on the city of Indianapolis.[6] In Peru a flood control district may be established by the circuit court on petition of at least 250 freeholders resident within the proposed district, unless a remonstrance, signed by at least one-half of the landowners affected, is filed in protest. The district is administered by three com-

[1] Laws Second Special Session, 1915, p. 65.

[2] Laws, 1915, p. 137.

[3] Laws, Delaware, 1915, p. 295; laws, Montana, 1915, p. 378; laws, Alabama, 1915, p. 167; laws Oregon, 1915, p. 540; laws, Indiana, 1915, p. 208.

[4] Laws, 1915, ch. 623.

[5] Laws, 1915, p. 229.

[6] Laws Indiana, 1915, p. 143.

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missioners, one of whom is the mayor of the city of Peru and two of whom are appointed by the circuit court for terms of four years. Benefits and damages are assessed by three disinterested appraisers appointed by the court. A maintenance tax for the upkeep and betterment of the works may be levied.[7] In Fort Wayne a flood control district may be established by the circuit or superior court on petition of a majority of the freeholders resident within the proposed district. The board of county commissioners and the board of public works constitute a board of flood district commissioners who administer the affairs of the district.[8] In cities of the 3d, 4th and 5th classes, petitions for the creation of flood control districts may, on authority of the common council or the board of trustees, be filed with the circuit court. Benefits and damages are imposed by appraisers appointed by the court and the general administration of the work is in charge of a superintendent also appointed by the court.[9] In New York river regulation districts, consisting of the whole or any integral part of the water shed of a river, for the construction of reservoirs for the regulation of the flow of the river, may be organized on petition of any landowner within the proposed district filed with the conservation commission, who have full discretion to establish districts. Districts once established are administered by a board appointed by the governor, at least two of whom must be residents of the district. The cost is borne wholly by the lands benefitted.[10]

Bulk-Head and Sea-Wall Districts. New Jersey authorized the governing body of any city, borough, town, township or other municipality of the State situated or bordering upon any navigable water, by general or special ordinance, to provide for the construction and maintenance of bulk-heads and other structures to protect public and private property from encroachments by water, the cost to be borne by the abutting property owners.[11] In Mississippi, sea-wall districts may be created by the boards of county supervisors on petition of the owners of real property likely to be affected; if the petition is signed by a majority of the landowners owning one-third of the land, or by one-third of the landowners owning a majority of the lands in the proposed district, the district is established without further proceedings; if signed by a fewer number of landowners owning a lesser amount of land, the supervisors have discretion to establish a district if they

[7] Laws, 1915, p. 159.
[8] Laws, 1915, p. 310.
[9] Laws, 1915, p. 478.
[10] Laws, 1915, p. 2208.
[11] Laws, 1915, p. 423.

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deem it advisable. Sea-wall districts are administered by a board of five commissioners who are real estate owners within the district, who prepare plans for the improvement, procure estimates of cost from an engineer and assess benefits and damages. The district is a perpetual corporation for the preservation of the walls.[12]

Sanitary and Storm Sewer Districts. In Montana boards of county commissioners are authorized to create special improvement districts in thickly populated localities outside the limits of incorporated towns and cities for the purpose of constructing sanitary and storm sewers, installing lights and such other special improvements as may be petitioned for by 60 per cent of the freeholders affected.[13]

School Districts. By far the largest number of districts created is for the establishment and promotion of public schools. One aspect of this movement is for the consolidation of existing school districts. Such laws were passed in Delaware,[14] Minnesota, Nebraska,[15] Idaho,[16] Kansas,[17] Mississippi and Nevada.[18] In all cases the consolidation of contiguous school districts must be approved by a majority of the electors affected. Consolidated school districts in Minnesota are designed to encourage industrial training, including the elements of agriculture, manual training and home economics; provision is made for the transportation of pupils, the expenditure of a reasonable amount for the payment of the room rent and board of pupils and the erection of dwellings for teachers. A reasonable amount of state aid is available to assist consolidated districts to erect buildings and transport pupils.[19] In Mississippi separate municipal school districts may be consolidated or new districts may be created by combining municipal corporations and adjacent territory.[20] In Nevada, industrial school unions may be formed by the consolidation of not to exceed six school districts for the purpose of giving instruction in manual training and domestic science. Such industrial unions are administered by a joint board consisting of one trustee from each component constituency.[21] The number of independent school districts created is extensive. Nebraska provided for the organization of county rural school districts in counties of less than 7000 inhabitants on approval of a majority of the qualified electors; the affairs of such districts are administered by a

[12] Laws, 1914, p. 361.
[13] Laws, 1915, p. 278.
[14] Laws, 1915, p. 566.
[15] Laws, 1915, p. 276.
[16] Laws, 1915, p. 145.
[17] Laws, 1915, p. 397.
[18] Laws, 1915, p. 27.
[19] Laws, 1915, p. 336.
[20] Laws, 1914, p. 263.
[21] Laws, 1915, p. 175.

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board of education consisting of five members elected by the qualified voters without party designation; sub-districts are administered by moderators, directors and trustees.[22] In Kansas, the legal electors residing in any territory containing not less than 16 square miles and comprising one or more townships or parts thereof may establish a rural high school district.[23] The largest number of independent school districts was created in Texas. These are all of the usual and standard type and present no important departures. All told, 36 such independent districts were created by as many special acts.[24] In Georgia one such district was created.[25]

Road Districts. The whole of the territory of Alaska was divided into four road districts; one road commissioner is elected for each district by the qualified voters at each general election; each commissioner appoints two assistants in each precinct in which work is to be performed to assist in awarding contracts and inspecting the work before acceptance; all work is performed by contract; the revenus for road construction consists of 75 per cent of the Forest Reserve Fund.[26] In Mississippi, road districts may be created by the boards of county supervisors on petition of 50 per cent of the owners of real estate owning 60 per cent of the real estate, or 60 per cent of the owners owning 50 per cent of the real estate in a proposed district; an engineer is appointed by the supervisors to make a survey of the region which will be benefited by the proposed system of roads, including the character, cost, size and location. Benefits and damages are assessed by three disinterested owners of real estate of the county, and the district is continued for the maintenance of the roads constructed.[27] By another act of Mississippi, the boards of supervisors are authorized to create road districts by ordinance and levy taxes for the construction of roads therein; the affairs of the district are administered by a board of three commissioners elected by the supervisors and a road superintendent elected by the commissioners.[28] In Oregon, two or more counties may unite to create a road building district and contribute such proportion of funds as

[22] Laws, 1915, p. 536.
[23] Laws, 1915, p. 406.
[24] Laws, First Called Session, pp. 171, 174, 180, 186, 193, 201, 205, Laws Regular Session, p. 1, 38, 50, 55, 63, 64, 66, 75, 104, 109, 116, 161, 175, 178, 196, 205, 209, 220, 224, 227, 228, 256, 269, 276, 278, 279, 283, 292.
[25] Laws, 1915, p. 979.
[26] Laws, 1915, p. 68.
[27] Laws, 1914, p. 221.
[28] Laws, 1914, p. 233.

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may be agreed upon.[29] Virginia created the towns of Hillsboro and Waterford a separate road district.[30]

Horticulture and Quarantine Districts. Indiana authorized the creation of horitculture and quarantine districts to prevent the spread of contagious diseases of fruit trees, to purchase spraying machines and to hire experts to inspect trees. Such districts are administered by voluntary associations, having three directors, and may not contain to exceed 20 square miles of territory.[31]

Tuberculosis Districts. In Wisconsin, tuberculosis districts consisting of not more than three countries, may be organized for the treatment of slightly advanced cases of tuberculosis; such districts are administered by a board of trustees consisting of one member from each county, elected by the joint county boards; the cost of maintenance is paid by the counties in proportion to the amount of taxable property.[32]

Fire and Water Districts. Fire and water districts are common in New England, and six new districts were created in 1915 and the territory of others extended. That part of the town of Bourne known as Monument Beach was authorized to organize as a fire district if approved by two-thirds of the resident electors within two years after the passage of the act. The district is authorized to purchase hose, hose carriages and other apparatus to extinguish fires and install a fire-hydrant service. The district is to be administered by a prudential committee who are authorized to employ policemen and watchmen to protect property and patrol the streets. Taxes are levied at meetings called for that purpose.[33] The Norton Fire District, previously created, was authorized to extend its limits by the annexation of contiguous territory if approved by two-thirds of the resident voters affected.[34] Rhode Island authorized the creation of the Pleasant View Beach Fire District, consisting of a part of the town of Westerly, if the establishment be approved by a majority of the interested, qualified electors. The officers who administer the affairs of the district consist of a moderator, a clerk, a treasurer, three assessors and one collector of taxes, elected annually; five wardens, engineers, assistant engineers and other officers and committees may also be elected. The purpose of the district is to provide for the extinction of fires, to supply water for manufacturing and domestic purposes and to construct and maintain side-

[29] Laws, 1915, p. 252.
[30] Laws, 1914, p. 196.
[31] Laws, 1915, p. 557.
[32] Laws, 1915, ch. 227.
[33] Special Acts, Massachusetts., 1915, p. 207.
[34] Ibid., p. 208.

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walks.[35] The inhabitants of a portion of the town of Barnstable, Massachusetts, were authorized to organize the South Fire and Water District, if the provisions of the act are accepted by a majority of the resident voters at any time within three years after its passage. Besides supplying water to extinguish fires and for domestic purposes, the district is also authorized to light its streets.[36] The Mansfield Water Supply District was authorized, on approval of two-thirds of the legal voters, to extend its limits by the incorporation of contiguous territory.[37] Maine authorized the creation of four water districts, Southwest Harbor,[38] Bath,[39] Hartland[40] and Anson,[41] upon the approval of a majority or two-thirds of the resident qualified electors. The administration of the district in each case is intrusted to a board of three trustees elected by the qualified voters or chosen by the municipal authorities who are authorized to fix the water rates and issue notes or bonds for the payment of any indebtedness incurred. The Southwest Harbor, Bath and Hartland water districts are authorized to purchase private plants now in operation and the Anson district is given equal opportunity to obtain a water supply with a private plant already installed.

Lighting Districts. Maine authorized the creation of the Wells Beach Lighting District when the act authorizing its creation is accepted by a majority of the voters affected. The district when organized is authorized to install and maintain the necessary apparatus to light all roads, streets and ways within its limits and to contract with any person or corporation to furnish light. Officers are to be elected annually and consist of a clerk, three assessors, a treasurer and collector and such other officers as the by-laws may provide for.[42] Montana authorized the creation of special improvement districts for lighting streets. The council of any city or town may create a special improvement districts embracing any street or streets or public highway and property abutting thereon for the purpose of lighting such streets. Not more than three-fourths nor less than one-fourth of the cost of installation and maintenance is borne by the property owners within the district; the re-

[35] Session Laws, 1915, p. 445.
[36] Special Acts, Massachusetts, 1915, p. 105.
[37] Special Acts, Massachusetts, 1915, p. 234.
[38] Special Laws, Maine, 1915, p. 509.
[39] Ibid., p. 602.
[40] Ibid, p. 612.
[41] Ibid, p. 620.
[42] Special Laws, Maine, 1915, p. 626.

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mainder of the cost is borne by the city at large.[43] In Kansas, on petition of a majority of the property owners affected, any city of the second class having a population of 1500–2000 and an assessed vaulation of $1,400,000, may create special illuminating districts and provide lights in addition to the regular city system. The cost of installation and maintenance is borne by the property owners affected.[44]

Bridge Districts. Maine authorized the creation of the Rumford and Mexico Bridge District, including territory situated in the towns of Mexico and Rumford, if approved by a majority of the legal voters of the two towns. The district, when organized, is empowered to purchase the toll bridge between the two towns now owned by a private company. The management of the bridge district is vested in a board of three trustees, two of whom are to be chosen by the assessors of Rumford Falls Village and one by the municipal officers of Mexico; the trustees have authority to establish toll rates, borrow money and issue interest bearing negotiable notes.[45]

Stone and Gravel Districts. Without constituting a district in the strict sense of the term, adjoining townships in Ohio, if authorized by a vote of the qualified electors therein, may combine to purchase stone or gravel and the necessary operating machinery. A manager is selected by the trustees of all the townships interested.[46]

Two new types of special municipal corporations have made their appearance this year, although structurally they are not dissimilar to existing types. These new types include electrical districts to supply light and power, authorized in Arizona and Nebraska, and special improvement districts for the clearing of land which may be rendered tillable by the removal of sagebrush, stone, timber, stumps, roots, logs, brush and débris, authorized in Idaho.

Electrical Districts. In Arizona, the proposition of forming an electrical district is submitted to the interested, qualified electors and landowners for adoption or rejection. The purpose of such districts is to construct, operate and maintain lighting, heating and power generating and distributing agencies of either gas or electrical energy, and for that purpose authority is given to use all roads, streets and thoroughfares within the district. The business affairs of such districts are administered by seven trustees, elected by the qualified voters of the district. For construction, maintenance, repairs, extensions and operations, the trustees fix a monthly service charge on the users of

[43] Laws, 1915, p. 351.
[44] Laws, 1915, p. 167.
[45] Special Laws, Maine, 1915, p. 520.
[46] Laws, 1915, p. 133.

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electricity not to exceed ten cents per kilowat hour for lighting, nor more than eight cents per kilowat hour for power and domestic uses other than lighting. If the rate so fixed does not yield sufficient revenue to meet the necessary expenses, the deficit is made up by a tax on all real estate within the district.[47] In Nebraska, electrical districts may be created on recommendation of the state board of irrigation, highways and drainage, and if approved by a majority of the electors affected. The affairs of the district are administered by three directors elected by the qualified resident voters. Within the larger district, directors are authorized to create electrical improvement districts of two classes: Public electrical improvement districts, composed of a municipality and one or more contiguous precincts outside the municipality; and private electrical improvement districts, composed of the premises of 20 or more landowners susceptible of being supplied with electrical energy by one common distribution line. Public electrical improvement districts are administered by three commissioners elected by the resident voters. Private electrical improvement districts are created on petition of 20 or more landowners and the cost of installing the necessary apparatus may in no case exceed 10 per cent of the value of the land in the proposed sub-district. The directors of the district fix the rates of service for each sub-district, which in all cases is furnished at cost. Any electrical district may be progressively enlarged by the annexation of contiguous territory.[48]

Land Improvement Districts. Land improvement districts may be created in Idaho by the district courts on petition of all the interested landowners. At the time of decreeing the creation of an improvement district, the court appoints a commissioner who must be an experienced, competent, licensed surveyor. The commissioner makes the necessary surveys, prepares a plat, and estimates the cost of clearing the land within the district. All by-products are the property of the district. When the land is cleared it may be apportioned into suitable tracts for sale.[49]

CHARLES KETTLEBOROUGH.

Indiana Bureau of Legislative Information.

Budgetary Laws. The very comprehensive budgetary provisions of the New York constitution have been anticipated by statute in several States in 1915. Washington, Vermont, Nebraska, North Dakota and Wisconsin adopted legislation on the subject.

[47] Laws Regular Session, 1915, p. 97.
[48] Laws, 1915, p. 443.
[49] Laws, 1915, p. 273.

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In Washington, chapter 126, p. 159, it is enacted that on or before October 15 in even-numbered years the head of each department and institution shall transmit to the board of finance (consisting of the governor, treasurer and auditor) itemized estimates for the ensuing biennium. The auditor shall prepare a statement of the appropriations of the current biennium with the amounts expended to September 30, and a statement of the appropriations for the two preceding bienniums. With these he shall present to the board of finance an estimate of the revenues of the ensuing biennium. Printed copies of these items of information shall be sent to all members-elect at least fifteen days before the legislature convenes.

The Vermont law, No. 26, p. 87, goes somewhat further into detail. The governor, auditor, treasurer, chairman of the finance committee of the senate, the chairmen of the ways and means and the appropriations committees of the house and the purchasing agent are constituted a committee on budget. The head of each department and institution is required during October in the even-numbered years to file a statement of the appropriations to his department or institution for the two preceding and the current bienniums together with the expenditures to date and requests for the next biennium. The statements are to be set forth under prescribed functional heads. Likewise, any person, institution or corporation proposing to request an appropriation or prefer a claim is required to present a statement to the committee, otherwise no such claim or request may come before the legislature. The committee is to prepare a statement containing the foregoing information together with a statement of the revenues of the current and two preceding bienniums and of unexpended balances and prospective revenues for the ensuing biennium. The statement must be sent to members-elect by December 1st and to each town clerk for public reference. The budget committee of the incoming administration may amend the estimates and must present to the legislature a consolidated statement of income and expenditures for three preceding bienniums and estimates for the ensuing period. At the end of the time allotted for presenting new bills, the committee is directed to make a statement of all appropriations carried in such bills together with their own recommendations therefor. After adding to the consolidated statement all appropriations carried in miscellaneous bills, the committee is to present a final appropriation bill.

The committee is empowered to examine any department or institution with a view to suggesting greater efficiency and economy and

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observe whether expenditures are kept within appropriations. Emergency expenditures may be made by the committee and included in the next budget.

The Nebraska legislature enacted a law providing a "budget system," (chapter 229, p. 532) by which the governor is made the chief budget officer. It is made his duty to prepare and transmit to the legislature a "detailed and summarized estimate" of the State's revenues and expenditures for the ensuing biennium as recommended by him and his reasons for recommending the same if any item varies from that of the last biennium. Items which must appear in such estimate are: Total valuation of property in the State, the state debt and interest charges, receipts and expenditures for the preceding biennium, estimated revenues of the ensuing biennium classified by sources, expenditures for the preceding biennium classified by departments and a detailed statement of the estimates for the ensuing biennium classified as expenditures for permanent improvements, salaries, maintenance and new undertakings. The governor's estimates are to be printed and available to members, citizens and the press at the convening of the legislature. To assist the public in comprehending the financial status of the State, the auditor is directed to prepare a clear and condensed statement at the close of the fiscal years showing the expenditure of each department and activity, in form for general circulation.

The state budget board of North Dakota consists of the governor, the state auditor, the attorney general and the chairmen of the appropriations committees of the house and senate of the preceding legislative assembly. The board is authorized to employ the necessary clerks, stenographers and expert accountants. Not later than August 1st of each year preceding a session of the legislative assembly, the state auditor obtains from each board, commission or department supported wholly or partly by public revenue an itemized statement of the amount of money necessary for the proper maintenance, extension or improvement of the department. The state budget board meets on the third Tuesday of November of the year preceding a legislative session to consider the estimates submitted. The head of any board, commission or department is authorized to appear before the board in defense of his estimates; members of the board may visit any institution to ascertain its financial needs; and public hearings may be had to adjust the various items of the budget. The budget so prepared is submitted to the general assembly, accompanied by explanatory statements, not later than the tenth day of the session.

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The budget must likewise contain estimates of the amount of revenue necessary to meet the accruing interest on the public debt and to recruit the sinking fund; an estimate of the revenues which the State will probably receive during the ensuing biennium; and the amount of all unexpended balances.[50]

Wisconsin provided a budget system for cities of the first class. The heads of departments are required to file with the city comptroller a detailed estimate of their financial needs, including improvements, during the ensuing year. The city board of estimates consist of the mayor, the president of the common council, the comptroller, the city treasurer, the city attorney, the commissioner of public works, and the members of the finance committee of the common council. The board meets annually on August 1. The board of estimates prepares a budget from the estimates so submitted and submits the same to the common council on or before September 15 of each year. At least one public hearing is had on the proposed budget before its final adoption. The common council by an affirmative vote of a majority of the aldermen may make changes in the proposed budget. The mayor may veto separate items of the budget.[51] FRANK G. BATES.

[50] Laws 1915, p. 67.

[51] Laws 1915, ch. 327.

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NEWS AND NOTES

Personal and Bibliographical

EDITED BY CHARLES G. FENWICK

Bryn Mawr College

The eleventh annual meeting of the American Political Science Association will be held in Washington, D. C., December 28 to 31. The headquarters will be at the Shoreham Hotel. The opening session on the evening of December 28, which will be a joint one with the American Association for Labor Legislation, will be devoted to the presidential addresses of Prof. Ernst Freund, and Prof. Henry R. Seager. The topics of the other sessions will be: Standardization and governmental efficiency; administrative tribunals; readjustments that will make toward peace (joint session with the American Society of International Law); improvement in the technique of direct legislation; and the growth of nationalism in the British empire. There will also be round table conferences on methods of instruction in political science, political scientists and practical governmental work, statute drafting, and the amending procedure of the federal Constitution.

Programs giving in detail the titles of papers to be read, information regarding hotel accommodations, railways, etc., will be mailed to members of the Association early in December.

Prof. Léon Dupriez, of the University of Louvain, gave the Godkin lectures at Harvard University during April and May on the subject of La Représentation Proportionelle en Belgique.

Prof. J. A. Fairlie has resumed charge of his courses at the University of Illinois after a leave of absence of a year and a half, during which he was engaged in directing the work of the Illinois efficiency and economy committee.

Dr. J. M. Mathews, of the University of Illinois, has been promoted to an assistant professorship of political science in that institution.

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Mr. Robert Porter Lane, M.A., University of Michigan, has been appointed to an instructorship in political science in that university.

Mr. Howard McDonald, M.A., University of Michigan, has been appointed to the chair of economics and political science of Muskigum College, Ohio.

Dr. Mitchell B. Garrett, recently instructor in history at the University of Michigan, has been called to the chair of history and political science at St. Lawrence University.

C. C. Kochenderfer, assistant in the political science department at the University of Wisconsin, has accepted a position as instructor at Cornell University for the coming year.

Assist. Prof. A. B. Hall has been advanced to the rank of associate professor of political science at the University of Wisconsin.

Dr. Paul S. Reinsch, United States minister to China, gave courses in the history of political thought and international law in the summer session at the University of Wisconsin. W. B. Webster, of the University of Wisconsin, has been appointed as Secretary to Dr. Paul S. Reinsch at Peking, China.

Dr. T. S. Adams, who has been a member of the Wisconsin tax commission for the last five years, has accepted an appointment as professor in the department of political science at Cornell.

Mr. Percival W. Viesselman has been appointed a teaching assistant in the department of political science for the ensuing year at the University of Minnesota.

Dr. J. S. Young, professor of political science at the University of Minnesota, was recently appointed director of the summer session.

Mr. Rockwell C. Journey has been appointed instructor in political science in the University of Missouri. Mr. Journey will also have charge of the municipal reference bureau which has just been established in the extension division of the University of Missouri.

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Jennings C. Wise, of the Richmond, Va., bar, formerly professor of political science at the Virginia Military Institute, is the author of a volume dealing with American political theories. It will soon be published by Putnam.

Dr. Thomas W. Page is directing several new courses that have been added to the curriculum of the department of economics and political science at the University of Virginia. They deal chiefly with problems of public finance. The summer school of the University of Virginia experimented last summer with courses in South American government. They were highly successful and will be added to the regular courses.

Pending the appointment of a professor of political science at the University of Alabama, Prof. Lee Bidgood, head of the department of economics at that institution, is giving an introductory course in American government, supplemented by brief courses in comparative government.

Dr. R C. McCrane has been elected instructor in history at the University of Cincinnati. Dr. McCrane is an alumnus of the University of Cincinnati, who has done graduate work at the University of Chicago and at the University of Wisconsin.

Prof. John K. Towles, who was professor of economics at Kenyon College, has accepted the professorship of commerce in the College of Commerce, University of Cincinnati.

Dr. Dexter Perkins, who has been instructor in history, University of Cincinnati, during the past year, has accepted an instructorship in history at the University of Rochester.

Dr. L. D. Upson, who has been director of the bureau of municipal research, Dayton, O., has resigned to accept a position as secretary of the board of directors of the National Cash Register Company at Dayton. Mr. C. E. Rightor has been chosen to succeed Dr. Upson.

Amherst College has introduced in the freshman year a course which is intended to serve as a general introduction to the field of the social sciences. In the first semester the course lays particular emphasis on

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social and political institutions and problems and is under the direction of Raymond G. Gettell, professor of political science. In the second semester chief emphasis is laid on economic institutions and problems, and the course is under the direction of Walter H. Hamilton, recently appointed professor of economics.

Mr. Edwin D. Dickinson, for the past two years instructor in political science in Dartmouth College, has been promoted to an assistant professorship in that institution.

Mr. Leonard D. White, Dartmouth '14, and recently graduate student at the University of Chicago, has been appointed instructor in political science in Clark College.

Prof. Philip Marshall Brown, A.M., has been appointed professor of international law at Princeton University, to fill the vacancy created by the resignation of Prof. Edward Elliott.

Dr. Frank E. Horack, of the State University of Iowa, has been promoted from the position of assistant professor of political science to professor of political science. At the same institution Mr. Jacob Van der Zee has been promoted from the position of instructor in political science to assistant professor of political science.

The State Historical Society of Iowa has issued a pocket edition of the *Constitution of Iowa*, with historical introduction and index by Benj. F. Shambaugh.

The October number of *The Iowa Journal of History and Politic* contains a comprehensive review of the legislation of the thirty-sixth general assembly of Iowa by Dr. F. E. Horack.

New courses offered by the department of political science at the State University of Iowa during the ensuing year are South American republics, Roman law, and the common law.

The second annual meeting of the Illinois Municipal League was held at the University of Illinois on November 2 and 3. Mr. R. E. Cushman, of the department of political science in the University, read a paper on "City Planning and the Courts."

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The work in political science and economics at the Virginia Military Institute, under the direction of Prof. W. M. Hunley, has been enlarged to include the whole field covered in the usual undergraduate courses. It is planned to add to the department courses in sociology either in the second semester this session or at the opening of next session. The Institute's library of political science and economics has been enriched by the addition of several hundred new volumes.

The New Hampshire legislature at its last session made provision for an investigation of towns, cities, and counties in New Hampshire with respect to their accounting systems, indebtedness and disposition of trust funds. The state tax commission was instructed to make such investigation and to report its findings to the next legislature. An account of the work that has been done will be included in the tax commission's report for 1915.

A meeting for the organization of a municipal league of the officials of New Hampshire cities is scheduled for December 8 and 9 in connection with the annual meeting of the New Hampshire Association of Assessors to be held in Manchester.

The annual conference on legal and social philosophy will be held in New York City, November 20 to 27, at the College of the City of New York. The general topic to be discussed will be the enforcement of law, including such subjects as the general significance of force, violence and compulsion in the organization of modern life, the sanctions of private, commercial, constitutional, and international law, and the general problem how social ideals can be made controlling in the field of social conduct.

The annual meeting of the Association of Urban Universities will be held in Cincinnati, November 15 to 17, 1915. This association, founded last year, purposes to study problems peculiar to universities, private or public, located in and serving municipal communities. This year, on invitation of the president of the association, the University of Cincinnati will be the meeting place, and the subject for discussion will be the mutual relation of the departments of city administration to the university, and the ways and means of training men and women for municipal, state, and national positions. Among those who will present papers are Mayor Frederick S. Spiegel of Cincinnati, Henry

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Bruére, city chamberlain of New York, late of the bureau of municipal research, and Prof. Leon Marshall, dean of the College of Commerce, University of Chicago. The officers of the association are: President, Charles Wm. Dabney, University of Cincinnati; vice-president; Dean Everett W. Lord, Boston University; secretary-treasurer, Walter E. Clark, College of the City of New York.

The preliminary program of the Second Pan-American Scientific Congress, to be held in Washington, December 27, 1915, to January 8, 1916, has been published by the Department of State. Section VI of the congress is to deal with international law, public law, and jurisprudence, and Section IX with transportation, commerce, finance and taxation. Under Section VI such problems will be considered as the relation of international law to national law in American countries, the specific American problems of international law, the possible codification of international law, judicial organization and election systems and methods. Under Section IX will be discussed questions relating to international railways, internal railway and waterway development, foreign trade among American countries, investments of foreign capital and a common monetary standard.

The annual meeting of the Academy of Political Science, held in New York City, November 12 to 13, was devoted to a discussion of present problems relating to the American mercantile marine.

The World Court is the title of a new monthly magazine, the first number of which appeared in August. It supplants the magazine formerly published by the International Peace Forum, entitled *The Peace Forum*, and has for its purpose the advancement of the project of a world court for the settlement of controversies between states. The subscription price is one dollar. Dr. John Wesley Hill is the editor, and the International Peace Forum the publishers.

The World Peace Foundation is issuing a separate series of pamphlets under the title of *Official Documents Concerning Neutral and Belligerant Rights* issued since August 4, 1914. Four such pamphlets have already been issued dealing with "Neutrality proclaimed and explained," "War zones," the *Wilhelmina* and *Frye* cases and "American trade in munitions of war."

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The H. W. Wilson Company of White Plains, New York, have issued an announcement of a Public Affairs Information Service which is a coöperative organization for classifying and disseminating information upon all questions of public significance. The information service was first organized and conducted by Mr. John A. Lapp, who is in charge of the Indiana bureau of legislative information, and it has now been reorganized and its scope enlarged. The service acts as a clearing house for information on public affairs by securing and listing publications of all kinds, forwarding free material to coöperators, furnishing copies of MS. material, etc. It issues a weekly bulletin together with cumulated editions every two months and yearly. The bulletins attempt to cover state legislative investigations and reports on state problems, court decisions touching upon the constitutionality of laws and ordinances, and in addition a wide range of studies and investigations by organizations and associations public and private. Coöperators contribute $100 per annum to the support of the service. Subscription to the bi-monthly and annual cumulated editions of the bulletin alone is $25 per annum.

The committee on organization of the proposed society for the promotion of training for public service has issued a pamphlet containing a statement of the aims and purposes of the society together with suggestions as to the manner in which the society may be organized. The proposed society is the outcome of the interest in the improvement of public administration created by the committee on practical training for public service of the American Political Science Association. Under the auspices of the society was held the second national conference on universities and public service.

Special Libraries contains in its issue for September a "List of References on Government Aid to Farmers and Immigrants," compiled under the direction of the Library of Congress. The list is limited to material bearing on direct government aid in the form of grants of land, advances of money or supplies, state supervision of coöperative enterprises, etc., and excludes such forms of state aid as farmers' institutes, agricultural education, etc. The works of foreign writers figure prominently in the list.

The second Heft of volume IX of the *Zeitschrift für Völkerrecht* is devoted to a discussion by a score of German publicists of the questions of international right raised by the sinking of the Lusitania.

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The July number of the *Annals of the American Academy of Political and Social Science* bears the title "America's Interests as Affected by the European War," the several contributions being grouped under the heads: America's International Trade as Affected by the War; The Relations of the United States with Central and South America as Affected by the War; America's Financial Position as Affected by the War; American Neutrality and the War.

The September number of the same publication is entitled "America's Interests after the European War," the group titles being: America's Industries as Affected by the War, The Stability and Development in America's International Trade, American Industrial Supremacy through Efficiency in Business Organization, Industrial Conservation through World Peace.

The National Short Ballot Association has issued a reprint in abridged form of the address delivered by Mr. Root before the New York Constitutional Convention on August 30, 1915, in support of the resolution to reduce the number of elective state officers and combine the 152 state departments into 17. *The Short Ballot Bulletin* for August comments on the adoption of the resolution and regards New York as the pivotal State in the movement, so that in this respect the short ballot in New York becomes a national issue.

Representation, the journal of the Proportional Representation Society, contains in its latest number, June, 1915, a review of Mr. Dicey's criticism of proportional representation in the new edition of his *Law of the Constitution*. Mr. Dicey admits that the House of Commons often fails to represent accurately the opinion of the electorate and that a system of proportional representation would reflect this opinion more exactly, but he is doubtful as to the desirability of having the House of Commons reflect every opinion of the electorate in proportion to its supporters. In reply Mr. J. Fischer Williams points out that there is no ground for thinking that "fads" would control the votes of any large number of persons or that election agents would be strengthened by the proposed system or that log-rolling would increase. In the same number Frederick Zeuthen contributes a description of proportional representation under the new Danish constitution.

The Alliance Française is publishing a bi-weekly bulletin which presents a brief commentary on current events relating to the war in

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Europe. A summary of the military situation is first given, followed by selections from foreign journals and private correspondence. Some of the selections are of considerable interest, such as the letter of M. Vandervelde to the German Socialist, Schiedemann, in No. 15, the comment on the position of the German government towards the Socialist repudiation of the plan of annexing conquered territory, and the description of the treatment of the Slavonic provinces by the Austro-Hungarian monarchy.

The publicity department of the National Wholesale Liquor Dealers' Association of America has issued *The Anti-Prohibition Manual* which contains among much that is useless some convenient statistical tables relating to prohibition laws and their connection with the welfare of the state. Some of the inferences from facts are amusing. Without considering other circumstances, dry and wet States are compared in respect to the death rate, crime, pauperism, divorce and savings accounts. It is gravely asserted that "the prohibition Turks trail at the tail end of civilization" and the explanation is apparently at hand. The pamphlet closes with an analysis of the arguments presented in congress against the adoption of the Hobson resolution.

The Report of the Committee on the Federal Income Tax, submitted to the ninth annual conference of the National Tax Association held on August 10 to 14, 1915, presents a careful analysis of the provisions of the income tax act and offers detailed suggestions in aid of a constructive reform of the law. The committee points out the injustice of forcing corporations to perform the work of collection which properly belongs to the government, a task which costs from 10 per cent to 20 per cent of the amount turned over to the government, and recommends that a system of information at the source should be introduced, the tax itself being collected from the individual. Further recommendations are made with respect to deductions for losses and depreciation of property, the lowering of the specific exemption from $3000 to $2000, methods of accounting, etc.

The April number of *Texas Municipalities*, the quarterly magazine published by the League of Texas Municipalities, of which Dr. H. G. James of the University of Texas is secretary-treasurer, contains an interesting article on the "Commission Form of Government" by Hon. Ben Campbell, mayor of Houston, Texas, in which the needs

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of city government are discussed in a familiar and popular style. The same number contains brief articles on the "Origin and Theory of the City Manager Plan," by H. G. James, and on the "Need of Civil Service Merit Rules in Texas Cities" by P. H. Sheldon.

The committee for immigrants in America is publishing a quarterly magazine, *The Immigrants in America Review* with the object of interesting American readers in the assimilation of immigrants into American industries and American communities. The *Review* is not concerned with either restriction or non-restriction of immigration; its wishes to show that if immigrants are admitted into the country the means of assimilation must be put within their reach. It hopes to act as a clearing house for all the immigration work being done in the country and will keep in touch with all governmental, industrial or social efforts in the interest of immigrants, and with legal decisions affecting them. The editor of the *Review* is Frances A. Kellar.

The University of Texas has issued further bulletins in the Municipal Research Series. No. 8 presents a "Model Health Code for Texas Cities," by Robert M. Jameson, secretary of the Bureau of Municipal Research and Reference. The code defines the powers and duties of health officers and prescribes regulations relating to food, drugs, sewage, animals, laundries, garbage, and interments. It is followed by a select list of references. No. 9 of the series concerns "Street Paving in Texas" and is edited by Edward T. Paxton. No. 10 deals with "Public Service Rates in Texas Cities," by E. T. Paxton, and No. 11 contains an article on "University Training for Municipal Administration," by Herman G. James, director of the Bureau.

The economy and efficiency committee of the State of Illinois has issued further pamphlets containing a *Report on the Military Department of the State of Illinois*, by Quincy Wright, a *Report on Civil Service Laws*, by A. C. Hanford, a *Report on the Secretary of State and Law Officers*, a *Report on Econony and Efficiency Commissions in Other States*, by A. C. Hanford, a *Report on Fire Insurance Rates in Illinois*, by Maurice H. Robinson, a *Report on Supervision of Corporations and Related Business*, by Maurice H. Robinson, a *Report on State Administration of Public Works, Parks and Buildings*, by C. O. Gardner, and a *Report on Accounting Administration for Correctional Institutions*, by Spurgeon Bell.

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The Annual Report of the Training School for Public Service conducted by the bureau of municipal research of New York contains a description of the purposes of the school, a list of present openings in public service, an explanation of conditions of admission to the school and a detailed program of instruction. The Report calls attention to the special committee appointed by the American Political Science Association at its meeting in 1912 to investigate opportunities for laboratory work for students in political science, and to the national conference on universities and public service held in New York in May, 1914.

In an address on the Sherman Law delivered before the Economic Club of Philadelphia, May 22, 1915, Mr. George W. Perkins followed up his earlier address on the *Outlook of Prosperity* delivered before the Economic Club of New York and in addition to showing where and why the Sherman Law has failed attempts to offer some constructive suggestions. He advocates the establishment by the federal government of a competent business court or commission to which corporations might go to obtain their charters and by which they would be called to account for violations of the law. Such violations would be punished with imprisonment of the individuals concerned without dissolution of the corporation, as is the case with national banks. The address is both instructive and suggestive, though Mr. Perkins does not make it quite clear how we are to expect the requisite good judgment and consistency from this business court, which is to possess both legislative and judicial powers, when we are unable to find such qualities in the decisions of the Federal Supreme Court.

In an able address before the Union League of Philadelphia, on March 23, 1915, Mr. Elihu Root analyses the change in the relation of business towards politics within the last two decades. The business men who elected President McKinley are now under the suspicion of a government representing the west and the south. Supervision of business is the characteristic of the day and supervision by people of the parts of the country which know little of the business of the country. Therein lies the reason for the stagnation, timidity, and unwillingness of American enterprise today. The conclusion he draws is that business must make it clear to the country that it is misunderstood, and an effort must be made to counteract the tendency towards bureaucracy. There is, however, no reference to certain exposures of the methods of big

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business as possibly affording a basis for popular mistrust of industrial corporations. *Timeo Danaos* has its part in government as well as in the affairs of armies.

A recent volume in the Municipal League series is entitled *Lower Living Costs in Cities*, by Clyde L. King (New York. D. Appleton and Company. 1915. Pp. 348). The author contends that "urban living costs are what we make them." He therefore opposes laissez faire methods in the modern city and advocates community control of the factors making for increased costs. His analysis of these factors is keen and the remedies suggested present a comprehensive and coherent program of action.

The Prize Code of the German Empire as in Force July 1, 1915 has been translated and edited by C. H. Huberich and Richard King (New York: Baker, Voorhis and Company. 1915. Pp. 200). The original German text is also given, together with the provisions of the treaties between the United States and Germany relating to prize law and the text of the War Zone proclamation of February 4, 1915 and the memorial by which it was accompanied. There also is a sketch of the development of German prize law since the Prussian Code of 1794, and a discussion of the present binding force of the Declaration of Paris, the Hague Conventions, and the treaties of 1785, 1799 and 1828 between this country and Prussia. The work will thus be of great value to all interested in understanding the authoritative views of Germany with reference to maritime seizures or destructions.

Judicial Administration is the title of an address delivered by Dean Thayer of the Harvard Law School before the Law Association of Philadelphia on January 25, 1915. It is a careful and illuminating discussion of the character of jury trial and of the position of the trial judge, and the criticism of the Slocum case (228 U. S. 364) is followed by suggestions as to the manner in which the constitutional difficulty may be evaded. The Law Association has also published an address on the *Regulation of Rates of Common Carriers by the Federal Government Alone*, by W. A. Glasgow, Jr., and the *Uniform Partnership Act*, by Samuel Williston, professor of law at Harvard University.

In a brief pamphlet entitled *Commercial Treaties of the United States*, published by the National Foreign Trade Council, Mr. Carman F.

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Randolph of the New York Bar reviews the commercial treaties in force and presents an analysis of their more significant provisions, among them being the recognition of private corporations as international traders, the "most favored nation" clause, the recognition of national vessels, reciprocal protection for trade marks, etc., and provisions regarding commerce during war. The National Foreign Trade Council was created in 1914 and has for its general object "to coördinate the foreign trade activities of the nation." It is non-political and non-partisan and its functions are investigatory and advisory. From time to time it publicly reports upon problems arising in oversea commerce.

Labor in Politics is the title of a booklet of some two hundred pages by Robert Hunter published by the Socialist Party at their headquarters in Chicago. In the chapter on the "Politics of the American Federation of Labor" the author shows that the Federation in spite of its motto, "no politics in the unions" has not only entered the arena of politics in order to secure legislation favorable to the laborer, but has allied itself through its officers with the Democratic Party. "Some Methods of Combating Labor" discusses the revelations made by Martin Mulhall in 1913 of the steps taken by the National Association of Manufacturers to defeat the cause of labor by influencing the laborers against their own interests. "Labor and the Capitalist Parties" discusses the danger to the labor movement in the endeavor on the part of the Federation to obtain reforms through subservience to the great political parties. "The Politics of Labor in Europe" offers a comparison with its methods in America, and the discussion closes with suggestions for future action.

In a brief pamphlet entitled *A Conference of Neutral States* issued by the World Peace Foundation Mr. Charles H. Levermore urges the convocation of a conference of neutral states which should remain in session during the duration of the war with the object of defining the rights of neutral states and providing for their effective defense. The foundation is also announcing the publication in its serial pamphlets of all the official documents concerning neutral rights and freedom of commerce and navigation that have passed between this country and belligerent nations since August 1, 1914. Three of these pamphlets have already been published and two more will be ready in October. The five pamphlets will cover in all about two hundred pages and as

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new material appears the foundation will publish it in future serial issues.

M. Jacques Flach, professor of the history of comparative legislation at the Collège de France has published a small volume upon the psychology of nationalism under the title, *La Formation de l' Esprit public allemand* (Paris, Librarie Recrueil Sirey, pp. 132). His object is to show the forces in German history which have determined Germany's conduct in the present war, to inquire how far that conduct was accidental and how far inherent, and to distinguish between individual and collective responsibility. In answer to those who divide public opinion in Germany into two tendencies, the one industrial and liberal, the other militarist and absolutist, the author asserts that these divergencies are slight in comparison of the unity of public spirit brought about by systematic prussification. The chapter dealing with philosophic doctrines is particularly concerned with the influence of Hegel, and it is interesting to note how closely his theory of international law (!) coincides with that of Treitschke and Bernhardi. Occasionally the author weakens his argument by a reference to the Teuton character in times too remote to have a bearing on the present. In an appendix are quoted selections from the writings of Benjamin Constant (1814) and Edgard Quinet (1832, 1842) predicting the development of the Prussian character into its present form.

Prof. Herman G. James, who has been prominently identified with municipal reform in Texas as director of the Bureau of Municipal Research and Reference, has published *A Handbook of Civic Improvement* (119 pp.) which departs from the familiar path of municipal literature in that it concerns itself almost entirely with municipal functions instead of municipal organization, and attempts to make the information contained in the text available for purposes of civic improvement. This is done by adding at the end of each chapter a question sheet which can be used as the basis of a city survey in that particular field. The different functions discussed are "Public Health," "Public Safety," "Public Education," "Public Morals," "Social Welfare," and "City Planning."

In a pamphlet of 38 pages, entitled *La Idea del Estado y la Guerra Europea* (Madrid, Libreria General de Victoriano Saurez), Adolfo Posada, of the faculty of law of the University of Madrid and the

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author of a number of works on various branches of public law, distinguishes between the two conflicting aspects of the state, whether as a coöperative human institution or as a force which proceeds from without and dominates over its subjects, and discusses the modern imperialistic nationalism, the "revised" Machiavellianism of Treitschke and Bernhardi. The remedy for the religion of war and for national aggressiveness he finds in a true democracy possessing a juridical conscience capable of ruling itself without dominating over others.

The *Debaters' Handbook Series*, which has furnished a number of very useful volumes dealing with present political and economic questions, has been supplemented by the *Handbook Series* of which two titles have appeared, "European War" and "Agricultural Credit." The new volumes, while abandoning the affirmative and negative classification of articles in the Debaters' Series, preserve the plan of selecting representative articles from various sources, mostly from current periodicals. "Agricultural Credit" is edited by Edna D. Bullock, who in a brief introduction expresses the opinion that the "bills now pending before Congress do not promise to crystallize into law soon" owing to the fact that it seems "difficult to convince the American legislator that conditions in this country are essentially similar" to those described in the report of the commission which was sent to Europe in the summer of 1913 to study the rural credit systems in operation there. Myron T. Herrick, in an article "The Farmer and Finance" expresses a hopeful view of the possibility of introducing a system of credit similar to that of the Raffeisen banks in Germany and the Credit Foncier in France, adapted, however, to the peculiar conditions of American farming. How these conditions differ from those prevailing in Europe is well pointed out in the article "Rural Credit" by Marion S. Lahman, who represented Oklahoma upon the European Commission, and who contrasts the community life of the European farmer, and his permanent location in one place, with the widely scattered farm houses of America and the shifting population. President Taft's letter to the governors of the states in advocacy of agricultural credit legislation is printed in full. The articles are preceded by a bibliography of general references and magazine articles.

The New York Times Review of Books forming section five of the issue of October 10, 1915, contains an excellent bibliography of books upon

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the European war published since the edition of April 18, 1915. In all 262 titles are included, showing a marked increase in the number of books during the past five months. Books and pamphlets dealing with the origin of the war and the nation or nations responsible for it have in general given way to books seeking to throw light upon the more remote or indirect causes. *Imperial Germany and the Industrial Revolution* by Thorstein Veblen (New York, Macmillan Company) shows the part played by industrial success as a force behind militarism. *Socialized Germany* by Frederic C. Howe (New York, Scribners' Sons) exposes the social and industrial methods which produced the efficiency of Germany and points out that America must adopt some of these methods if she is to compete with Germany after the war. *German Philosophy and Politics* by John Dewey (New York: H. Holt and Company) contends that German militarism is an attempt to give a practical direction to Kant's doctrine of two realms, the one outer and physical, the other inner and ideal.

Several elaborate histories of the war are in progress. In addition to Prof. Ellery C. Stowell's work on the *Diplomacy of the War of 1914* announced as forthcoming in the last issue of the REVIEW, there is *The Great War, Causes of and Motives for*, by Prof. George H. Allen, which is the first of a series of "non-partisan" volumes covering all phases of the war in Europe (Philadelphia, G. H. Barrie's Sons), together with *The Elements of the Great War*, by Hilaire Belloc (Hearst's International Library) the first two volumes of which have appeared.

The volumes on the war by "eyewitnesses" have greatly increased. Most of them are by newspaper correspondents and in many cases they sound a note of warning to the United States of the danger of unpreparedness, as in the volume *With the Russian Army* by Robert R. McCormick (New York: Macmillan Company). *What is Back of the War*, by Albert J. Beveridge (Bobbs-Merrill Company) is a study of public sentiment in the warring countries and an estimate of their resources, and owing to the author's unusual opportunities of obtaining information at first hand the volume is of particular value. *With Briton and Gaul at War*, by Frederick Palmer (Dodd Mead and Company) gives us the personal experiences of a veteran war correspondent and is at once vivid in style and restrained in its observations.

The relations of the United States to the situation in Europe are presented in a number of volumes. *The Military Unpreparedness of the*

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United States, by Frederic L. Huidekoper, announced as forthcoming by the Macmillan Company will present the results of years of study by one of the foremost military experts in the United States. *Economic Aspects of the War* by Prof. Edwin J. Clapp (Yale University Press) contains a strong protest against Great Britains' infringements of our rights as a neutral power on the high seas. *The World's Highway*, by Norman Angell (G. H. Doran Company), discusses the part the United States must play in effecting the neutralization of the sea. *The United States and the Next War*, by George Lauferti (Athenaeum Press) follows the lines of Usher's *Pan-Americanism* in predicting that whichever side wins America may have to fight the victor.

Several studies of the war from the point of view of biology and the social sciences are to be found in *War and the Breed*, by David Starr Jordan (Boston: The Beacon Press), *Evolution and the War*, by P. Chalmers Mitchell (E. P. Dutton Company), *Social Progress and the Darwinian Theory*, by G. W. Nasmyth (G. P. Putnam's Sons), and *War, Science and Civilization*, by W. E. Ritter (Boston, Sherman, French and Company).

A number of collections of diplomatic documents have appeared, such as *The Protection of Neutral Rights at Sea*, by W. R. Shepherd (Sturgis and Walton) containing the diplomatic correspondence of the United States, Germany and Great Britain upon that subject, *Documents Relating to the Great War*, by Giuseppe A. Andriulli (London: T. Fisher Unwin), and the report and evidence presented by the Bryce Commission concerning the alleged German atrocities (Macmillan Company).

DECISIONS OF STATE COURTS ON POINTS OF PUBLIC LAW

JOHN T. FITZPATRICK

Constitutional Conventions—Manner of Calling. State vs. American Sugar Refining Co. (Louisiana, May 24, 1915. 68 S. 742.) The customary manner of calling constitutional conventions in the United States is by a resolution of the legislature followed by a submission of the question to the electorate. However, in the absence of express provision or restriction in the organic law the power of calling such a convention is vested in the representatives of the people in legislative session convened. When a governor calls a legislature in extra session

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for the purpose of submitting the question of calling a constitutional convention to the people, he may not limit the call for a convention to a single subject. Having authorized legislation on the subject-matter he has no further power in the premises.

Dwellings—Classification for the Purposes of Removal of Ashes. Mayor, etc., of City of Baltimore vs. Hampton Court Co. (Maryland, June 22, 1915. 94 A. 1018.) A classification of the board of estimates of a municipality for the purposes of the removal of ashes from dwellings, that houses not more than four stories in height, and not having an elevator used for delivering purposes, should be classed as dwellings, and that the commissioner should remove ashes therefrom, but that houses of more than four stories and occupied by more than one family, should be classed as apartment houses, intended to relieve the municipality from the expense of collecting ashes from larger buildings, such as hotels and apartment houses, was ultra vires, arbitrary and unreasonable, and so void.

Former Jeopardy. Curtis vs. State. (Texas, April 21, 1915. 176 S.W. 559.) Where the statute makes burglary of a residence at night a distinct offense from ordinary burglary, the fact that defendant was indicted and placed on trial for ordinary burglary, does not constitute a jeopardy so as to preclude a second indictment and trial thereon for burglary of a residence at night where the court withdrew the case from the jury upon the first trial.

Former Jeopardy. Ex parte Bornee. (West Virginia, May 28, 1915. 85 S.E. 529.) A statute which gives the State a right of appeal in prosecutions for violation of the liquor laws cannot stand, since it denies to the defendant the constitutional protection that he shall not be twice put in jeopardy for the same offense, the punishment for such violations involving imprisonment. And an amendment to the constitution giving the supreme court of appeals of a State "such other appellate jurisdiction in both civil and criminal cases as may be prescribed by law" did not give the legislature power to alter the meaning of jeopardy in the bill of rights by providing for such appeal.

Elections—Preferential Voting. Brown vs. Smallwood. (Minnesota, August 27, 1915. 153 N.W. 953.) The preferential system of voting provided by the Duluth charter, whereby first choice, second choice

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and additional choice votes are permitted, is unconstitutional. The word vote, as used in the constitution does not mean that the ballot of one elector, cast for one candidate, could be of greater or less effect than the ballot of another elector cast for another candidate. It was not intended that with four candidates one elector could vote for the candidate of his choice and another elector could vote for three candidates against him. The preferential system diminishes the right of an elector to give an effective vote for the candidate of his choice. If he votes for him once, his power to help him is exhausted. If he votes for other candidates he may harm his choice, but cannot help him. It is not a voting of man against man. (Orpen vs. Watson, 93 A. 843 cited to the contra.)

Highways—Use by Jitney Busses. Ex parte Dickey. (West Virginia, June 22, 1915. 85 S.E. 781.) All rights of common carriage on highways, such as those conducted by means of drays, omnibuses, hackney coaches and taxicabs, are legislative grants or concessions much lower in legal quality and dignity than the rights of ordinary use to which highways are incidentally subjected by citizens in travel and the prosecution of their business. The legislature may qualify such grants by prescribing the number, character, routes, rates and hours of service of common carrying vehicles on the highways, or it may delegate such power of regulation to municipal corporations. Under such authority a municipal corporation has power to prescribe the routes and hours and rates for and impose a license tax upon jitney busses carrying passengers along its streets.

Income Tax. United States Glue Co. vs. Town of Oak Creek. (Wisconsin, June 16, 1915. 153 N.W. 241.) The tax imposed by the income tax law of Wisconsin upon incomes derived from transactions without the State, does not impose a burden upon business or property repugnant to the provisions of the United States Constitution conferring on congress the right to regulate interstate commerce. The tax deals only with that part of the fruits of such commerce which remains as the net proceeds after all the immediate burdens of commerce have been discharged and such net profits are merged in the assets.

Indeterminate Sentence. Klette vs. Commonwealth. (Kentucky, June 15, 1915. 177 S.W. 258). A verdict fixing the defendant's punishment "at not less than two years nor more than two years in the

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penitentiary" is not indeterminate or for an indeterminate term within the letter or spirit of an indeterminate sentence law.

Indians—Treaty Rights; Jurisdiction of State Courts. People vs. Becker. (New York, May 11, 1915. 109 N.E. 116.) A treaty with an Indian tribe reserving to the members thereof the right in common with other people to take fish on territory which was ceded away by such treaty, and which does not purport to secure to such Indians exclusive and special privilege in such fishing rights, is not superior to the right of the State to enact police legislation for the preservation of fish, and does not relieve the Indians from the observance of general laws regulating the taking of fish. An Indian violating police regulations of the State may be arrested and subjected to the jurisdiction of the state courts where both the violation and arrest occur outside of a reservation.

Interstate Commerce—Federal Protection of Migratory Birds. State vs. Sawyer. (Maine, July 21, 1915. 94 A. 886.) The States, as sovereignties, have the exclusive right to regulate the taking of wild game, unless such right is conferred upon the federal government. The commerce clause of the United States Constitution does not warrant the act of congress, passed March 4, 1913, regulating the taking of migratory birds within the several States, the taking of such birds not being an act of "commerce." Nor is the act warranted by the general welfare clause, declaring that congress shall have power to dispose of and make all needful regulations respecting the property of the United States, for wild game is not property belonging to the federal government.

Interstate Commerce—Carmack Amendment. Michelson vs. Judson Freight Forwarding Co. (Illinois, June 24, 1915. 109 N.E. 281.) The Carmack amendment to the interstate commerce act, regulating the liability of any common carrier receiving property for interstate carriage, covers every detail of the subject; and there can be no doubt that congress intended by the act to take full possession of the subject of interstate shipments, and that the effect of the act was to supersede all state laws and regulations on the subject.

Intoxicating Liquors—Prohibition of Publication of Advertisements to Promote Sale. State vs. Delaye. (Alabama, May 13, 1915. 68 S. 993.) The anti-advertising liquor law, prohibiting the sale of newspapers and magazines containing liquor advertisements, is within the

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police power of the State to regulate traffic in intoxicating liquors. Newspapers, published out of the State and sent into the State, become subject to this regulation upon the bundles being broken and the individual newspapers placed on sale.

Legislative Procedure—Legislative Journals—Reading of Bills. Heiskell vs. Knox County. (Tennessee, June 5, 1915. 177 S.W. 483.) The court will take judicial notice of the journals of the legislature, even before they are published. Such journals cannot be impeached even for fraud or mistake, the recitals therein being conclusive. If there are any errors the house itself is the only tribunal authorized to correct them. A constitutional requirement that a bill be read in each house on three separate days, is satisfied when a senate bill which has been duly passed in that house, is substituted for a house bill, the same in tenor and substance, which had already had two readings on separate days in the house and was on order of third reading.

Married Women's Enabling Act. Porlow vs. Turner. (Tennessee, July 23, 1915. 178 S.W. 766.) An act abrogating all common-law disabilities of married women, and providing that every woman, now married or hereafter to be married, shall have the same capacity to acquire, enjoy, and dispose of all property and to make any contract in reference thereto as if she were not married, is not invalid as destroying any vested rights of a husband in a marriage occurring prior to the passage of the act.

Municipal Corporations—Home Rule. People vs. Village of Pelham. (New York, June 18, 1915. 109 N.E. 513.) An act which provides for a scheme of assessment and taxation for the townships, villages and tax districts within a certain county, wherein it is provided that there shall be but one board of assessors in each town, is unconstitutional as violative of the home rule guaranty of the Constitution as depriving villages of a right of self local government by transferring the powers covered by the act to the towns in which the villages of the State are contained.

Municipal Corporations—Powers; Building Permits. People vs. Village of Oak Park. (Illinois, April 22, 1915. 109 N.E. 11.) A municipal corporation possesses and can exercise the following powers and

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no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. If a doubt exists concerning the grant of power, the doubt is to be resolved against the municipality. Where the plans and specifications for a proposed building comply substantially with the provisions of a building ordinance, the municipal authorities must grant a building permit notwithstanding the failure of the commissioner of public works to give his approval to the plans.

Public Utilities—Act Requiring Street Railroads to Grant Free Transportation to Police Officers. State vs. Sutton. (New Jersey, June 14, 1915. 94 A. 788.) An act by which street railway companies are required to grant free transportation to police officers when in uniform or on duty, is a constitutional exercise by the legislature of its police power. The result of the statute is to induce the presence of the police upon street railway cars, and the police protection thus secured is within the object expressed in the language of the statute. Even if it be permissible to find that the purpose of the legislature was to save expense to the public by throwing it upon public utilities by the exaction from them of an unconstitutional tribute, the construction will be given to the statute that will sustain its constitutionality where the object expressed is in fact accomplished.

Public Utilities. State Public Utilities Commission vs. Noble Mut. Telephone Co. (Illinois, June 24, 1915. 109 N.E. 298.) A mutual telephone company, not a commercial company organized for profit, but which renders service to its members at cost, and does not hold itself out to render service to any one except members; which only makes connection with other companies upon the basis of a mutual exchange of free service; and which while connecting its members with a toll line for long distance service, collects no toll, leaving the matters of toll charges to adjustment between the members seeking such service and the toll companies, is a "public utility." A public use means public usefulness, utility, advantage or benefit. To be public the use must concern a community as distinguished from an individual or any particular number of individuals, but it is not essential that the entire community or people of the State, or any division thereof should be benefited. The use may be local or limited.

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Race Segregation. Harris vs. City of Louisville. (Kentucky, June 18, 1915. 177 S.W. 472.) A municipal ordinance which prohibits any colored person from occupying as a place of residence or place of assembly for colored people a building in any block in which the greater part of the houses are occupied by white persons, and vice versa, but which provides that it shall not affect the location or use of such places established previous to its enactment, does not take away the right of alienation, but is merely a restriction upon alienation by taking away the probability of alienation to certain classes of purchasers, and as such, does not deprive the owners of vested rights. The fact that such an ordinance would have the effect of excluding colored people from the more desirable parts of a city does not deprive them of liberty or property without due process of law, since they can improve their sections of the city until they are equal to those of the whites. Such an ordinance is a valid exercise of the police power of a municipal legislature as a reasonable measure for the public welfare, in view of the settled public policy of the State to secure the separation of races. (State vs. Gurry, 121 Md. 534, 88 A. 546; State vs. Darnell, 166 N. C. 300, 81 S.E. 338; Carey vs. City of Atlanta, 84 S.E. 456, distinguished.)

Railroads—Spur Tracks. McInnis vs. New Orleans & N. E. R. Co. (Mississippi, May 31, 1915. 68 S. 481.) A statute which authorizes the railroad commission to require railroads to construct spur tracks so as to connect their main lines with industrial plants, without regard to the necessity therefor and without requiring any indemnity for the money expended, is unconstitutional.

Sanitary Ordinance. City of New Orleans vs. Ricker. (Louisiana, July 31, 1915. 69 S. 416.) A city ordinance requiring the rat-proofing of houses and other structures for the purposes of preventing and eradicating the bubonic plague, is not unconstitutional as being either confiscatory or discriminatory.

Slaves—Rights of Inheritance of Children. Napier vs. Church. (Tennessee, May 29, 1915. 177 S.W. 56.) Slaves could not contract and therefore were incapable of entering into relationship of a valid marriage. No civil rights could grow out of a slave union and slaves were incapable of inheriting property from each other. The slave marriage was a mere cohabitation, and subject to be absolutely terminated at the will of the master at any time. Since the war between the States,

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however, various statutes have been enacted in the former slaveholding States by which, with limitations, children of these slave unions are entitled to inherit.

Statutes—Force of English Statute Enacted in 1752. Hudson vs. Flood. (Delaware, June 28, 1915. 94 A. 760.) The constitution of 1776 of Delaware provided that the common law of England, as well as so much of the statute law as should have been adopted in practice, should remain in force. A statute of 25 George II, passed in 1752, relative to attesting witnesses to a will, which provided that its provisions should extend to British colonies in America, is not in force in Delaware where there is no tangible evidence of its enactment or adoption there.

Workmen's Compensation. Jensen vs. Southern Pac. Co. (New York, July 13, 1915. 109 N.E. 500.) A workmen's compensation act, providing for a scheme for a compulsory compensating by employers of workmen injured in hazardous occupations, and which deprives employers of the defense of contributory negligence, assumed risk and negligence of a fellow servant, is a valid exercise of the State's police power and is not violative of the fourteenth amendment to the United States Constitution. This in view of the amendment to the state constitution of 1913 and of the decisions of the United States supreme court. (See Jeffry Mfg. Co. vs. Blagg, 235 U. S. 571. Ives vs. South Buffalo Ry. Co., 201 N. Y. 271, 94 N.E. 431, distinguished.) Such an act is applicable to employees engaged in interstate commerce for whom a rule of liability or method of compensation has not been provided by congress.

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BOOK REVIEWS

The New American Government and its Work. By JAMES T. YOUNG. (New York: The Macmillan Company, 1915. Pp. xi, 658.)

This new book on the American government deals almost entirely with our government as it is today and the governing work which it has done in recent years, in State and nation. The work is not historical in the sense of dealing with the distant past but it is historical in its method and content in dealing with the living present. It does not deal with local government, apart from the field of state legislation. It does not consider *rural* government nor does it in any way attempt to reveal the evolution of our government from the institutions of the past. There is nothing in the volume about shires or counties or the sheriff or the posse comitatus, nothing about the town or the town-meeting, or any other of our traditional and revered governmental fountainheads and origins. It does not discuss colonial charters and their relation to state constitutions, nor does it explain the principles of the American Revolution nor the weakness and failure of the Old Confederation. It tells nothing of the making of the United States Constitution nor how the Union grew nor how the national government of today came to be what it is. The past is left on one side, except as it is incidentally drawn upon to illustrate the civic and social law and government of the generation now living.

Without presenting any historical background the author starts right in with the influence of modern business on government and with the influence of modern business on government and with a description of the real influences and actual processes by which government is conducted. He shows how in actual practice the traditional and antiquated theory of "checks and balances" and "division of governmental powers" are superseded and disregarded. The author first takes up the national government, giving a few of his briefer chapters to the character and conduct of the presidency and to the working of the senate and house. Historical illustrations are used to throw light upon present day operations and the recent changes in the personnel and conduct of our legislative bodies are analyzed and presented in a

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way to point the significance in the new line-up of forces in the national political arena.

The main strength of the volume lies in its discussion of the powers of congress and of the enlarging functions and powers of government as seen in state legislation. Nine full chapters are devoted to the powers of congress. These chapters deal with taxation and finance, the regulation of commerce, the trade commission, the federal police power, the war power, congressional conservation, and national control over territories. Much of the treatment deals with the scope, constitutionality, and effect of national laws. Numerous court decisions and authorities are cited and drawn upon to support and explain the statements and conclusions that are given. The more important congressional acts touching taxation and money, railway regulation, federal control over state trade, combinations in restraint of trade, corporation taxes, holding companies and interlocking directorates, acts relating to pure food and drugs, immigration, conservation, the general police power—these and kindred lines of congressional activity receive ample attention and elucidation.

Almost an equal amount of space is given to the States and their work, in their regulation of business and in their greater activity, increasing laws, and enlarging powers, in relation to labor, education, health, police powers, charities and corrections, taxation, finance, highways, and the safe-guarding of civil rights in conflicts between individuals and corporations. Such are the subjects matter of the author's work, and his presentation of them mark him as a student not only of political science but of economics and sociology as well. Any one who is interested in social conditions and the way government is attempting to meet these conditions will find a great store of information and rich food for thought in this volume. A chapter on public opinion deals with the various organizations and agencies that help to affec opinion—civic associations, expert advice, clubs for propaganda, the Farmer's Grange, manufacturing associations, and labor movements. A full score of movements, or causes, have each its organization behind it to push its claims and demands upon the attention of public opinion and of the law making body.

The large field of party government, party organization and party usage, is very meagrely considered, in view of the large, if not preponderating, influence that party has always had, and still has, in the control of government in America. Herein is the weaker side of the volume. The author may be doubted when he asserts that the na-

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tional committee in substance controls the national convention. It did so once in a notable case in recent party history, but it had not usually done so before and it is pretty certain not likely to do so again. It is questionable to speak of "the South and Southwest where there are no Republican voters," and it is quite too liberal to say that the Republican party has adopted the plan for "a representation of each State based on the Republican vote of that State" (p. 554). The new representation of four delegates at large and one from each congressional district still retains the old *federal* idea of representation based on both States and population; the party vote is not yet made the measure of power in the national convention. The unwritten law of the party, that is, old party habits are hard to change—new wine seems to have an aversion to old bottles.

In a volume treating of such a wide and varied range of topics as this volume attempts, it is usually not difficult for a reviewer to point out some errors both of omission and commission. Teachers and students who use the *New American Government* will find its index inadequate. The vice president and presidential succession appear to be dropped from the volume. Indiana readers will be disappointed to note that in the chapter on "The State and Education," the "Gary Plan," now so widely discussed, and the creditable beginning by Indiana in the promotion of vocation training so highly recognized by Professor Dewey, receive no mention from our author.

But it may seem ungracious to point out minor errors in a volume so excellent and so compact with valuable information. Professor Young's volume will be found a most useful and workable text for college and academic classes in the study of the American government and of recent experiments and policies in American legislation.

Das Internationale Landkriegsrecht Erläutert. By DR. KARL STRUPP. (Frankfurt am Main: Joseph Baer & Co., 1914. Pp. xii, 252.)

The past year has not tended to produce a judicial attitude upon current European works on the international law of war. It is easy to be biased, hard to be just. With such an admission the reviewer approaches Dr. Strupp's monograph on the *International Law of Landwarfare*. The author's scholarly reputation makes one anticipate a valuable contribution to the subject. But is such a thing possible at the present time? The main body of the text was evidently prepared

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before the outbreak of the war. Some of the footnotes, however, unfortunately abound in modern instances upon which no really judicial utterances are possible. The author's remarks upon the German invasion will illustrate what is meant. "Das Belgien seinerseits einem französchisen Durchmarsch keinen Widerstand entgegengesetzt hatte, ohne Rücksicht auf die him durch die V. Haager Konvention und durch die Verträge vom 19. April 1839 besonders auferlegte Neutralitätspflicht, steht heute fest" (p. 134, n. 1). Necessity justified Germany's action. With this doctrine all of us have become familiar. Dr. Strupp incorporates Huber's elaboration of Lueder's doctrine of Kriegsraison. Necessity, we learn, is of four kinds: Staatsnotwendigkeit, Kriegsnotwendigkeit, militärische Notwendigkeit, and eigentliche Notstand, each of which is fitted into a carefully graduated scale of availability.

The work is arranged as a commentary upon the various Hague conventions upon land-warfare. Each section of the conventions is expounded, illustrated, and accompanied by a wealth of incidental and textual material. But *cui bono?* What is the status of these Hague conventions? What for the past year has been their sanction? International public opinion? *Weltsittlichkeit?*

JESSE S. REEVES.

Die Geschichte der Pan-Amerikanischen Bewegung mit besonderer Berücksichtigung ihrer völkerrechtlichen Bedeutung. By DR. ROBERT BÜCHI. (Völkerrechtliche Monographien herausgegeben von Dr. Walter Schücking und Dr. Hans Wehberg Heft 2, Breslau, 1914, J. U. Kern's Verlag. Pp. xvi, 189.)

What special qualifications the author of this work has for his task are not disclosed even after reading the book. The monograph has all the trappings of scholarship: bibliography, copious citations, labored divisions into headings, sub-headings, paragraphs and sub-paragraphs, all carefully and systematically arranged. The bibliography, however, discloses not a single title in Spanish or Portuguese, and one may assume that the author is not familiar with these languages. This complete absence of Latin-American material (save through translation) sufficiently discloses the principal limitation of the work.

After a preliminary chapter upon America and international law, in which the obvious conclusion is reached (*pace* Alvarez) that there is no special American international law, the author proceeds to the main subject. With him the phrase Pan-American movement is de-

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cidedly limited: it begins with the first Pan-American conference of 1889. Such being the case, it is not surprising to find that the principal sources of information are the official proceedings of the various conferences. Each conference is described as to its organization, methods, problems, and results. There is added a discussion of the Central American conferences. In general the conclusion of the author is that in so far as such conferences have looked toward political results they have failed. "So long as the Monroe Doctrine, with its various transformations and aggressive character forms the *leit-motiv* of the policy of the United States no complete and lasting *rapprochement* between Latin and Anglo-Saxon America is to be expected (p. 194)." Nevertheless the Pan-American conferences and various private instrumentalities have, he admits, tended to dispel mutual distrust. Dr. Buchi's statements of fact seem to be exact, and his interences cautious, but there is a mechanical quality about the work—a failure to penetrate beyond the official records—which deprives the monograph of most of its value for the American reader.

JESSE S. REEVES.

Bender's War Revenue Law 1914. By the PUBLISHER'S EDITORIAL STAFF. (Albany, N. Y.: Matthew Bender and Company, 1914. Pp. xxviii. 181.)

This volume presents the act of Congress approved October 22, 1914, commonly known as the war revenue law, or the emergency revenue act of 1914, in a setting of interesting and valuable information. There is an introductory historical sketch of the excise laws of the United States showing the relation of the present statute to preceding legislation of similar character, particularly the war revenue act of 1898 which it substantially re-enacts with certain modifications. Next comes an outline of the United States internal revenue laws in general, explaining briefly the established revenue system at the time the emergency Act of 1914 was super-added. Each section of the present statute is annotated to former statutes, departmental rulings and court decisions construing similar language in other acts. There are also a general table of statutes through which the development of the United States internal revenue system and legislation can be traced, suggestive bibliographical notes, a summary table of taxes, a table of cases, and a general index.

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The present work should meet the entire satisfaction of those who require a specialized manual devoted to the subject matter with which it deals. J. WALLACE BRYAN.

The Monroe Doctrine: National or International? By WILLIAM I. HULL. (New York: G. P. Putnam's Sons, 1915. Pp. vii, 129.)

This small volume with but some hundred and thirty words to the page is most attractively printed. The book consists of three addresses delivered respectively before the American Society for the Juducial Settlement of International Disputes, the American Society of International Law, and the Lake Mohonk Conference on International Arbitration. The addresses are reprinted as they appear in the publications of these societies with a few changes in titles and phraseology, the transposition of several pages from one address or chapter to another and the suppression of a few pages of literal repetition. Their original purpose is apparent in the book. Their style is that of the spoken rather than the written word; and there is a considerable amount of repetition. The first ten pages of both the second and third chapters are reductions of the first, serving as introductions to the later chapters.

The first paper contains a brief historical résumé of the development of the doctrine leading to the present onerous responsibilities of the United States and the accompanying interference in the affairs of our neighbors. The second states seven proposed solutions of the future of the doctrine. The third contains the author's suggestion that the doctrine be no longer considered purely national, but that it be merged in a universal guarantee of the territorial integrity of all states under the protection of The Hague Tribunal. On the whole, the book cannot be considered a weighty contribution to the voluminous literature on the subject. ROBERT T. CRANE.

Woman's Work in Municipalities. By MARY RITTER BEARD. (New York: D. Appleton and Company, 1915. Pp. x, 337.)

It has long been hinted that woman's small place in history is due to the fact that women have not written history. So zealously has this neglect been remedied in the present instance, so amply has been recorded every item of American women's interest in the life of their cities, that much of the resulting book might obviously have been writ

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less large. If somewhat long, the work is nevertheless an excellent and comprehensive picture of women's public activities.

Originally intended to be a collection of readings, the book is largely an extensive compilation of clippings and notes from newspapers, periodicals, and the records of societies. Numbers of these items are quoted, sometimes at length, though many have been digested. They refer to general social, rather than strictly political, interests, except that there is a chapter on government and administration which contains a record of campaign activities and office-holding.

Two of the avowed purposes of the book have been admirably accomplished. The first is to give a notion of the extent of women's local interests and activities. On the facts presented, it would appear to the reader that, despite the wide modern range of women's interests, they are still concentrated, as is natural and desirable, about subjects that have long lain in woman's domain—the home, and the care of the young and helpless. But their point of view has been enlarged to cover the community as well as the family. Evaluation of women's work is not attempted and is scarcely possible for the study is absolute in its treatment and does not show the comparative part of women in the enormous general increase in municipal activity and interest in recent years.

The second purpose is to indicate the spirit in which women have approached their problems. The spirit indicated is that of intolerance. It would appear that women are opposed unalterably to the segregated vice district, for example. The evil of these districts had been generally recognized by men; but the evils following their abolition have often induced men to permit their continuance. If women are as united as would appear on this question, the segregated district is doomed. And if this attitude of mind is general among women, it is a force which will inevitably profoundly modify the solution in future of many of our civic problems.

The volume appears in the municipal league series.

ROBERT T. CRANE.

Cyclopedia of American Government. Edited by ANDREW C. MCLAUGHLIN AND ALBERT BUSHNELL HART. (New York and London: D. Appleton and Company, 1915. 3 volumes. Pp. xxxiv, 732; vi, 773; v, 785.)

Many cyclopedias have been heretofore published, with a wide variety of subject matter. But the work under review is in some

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respects a new type. At the same time it bears enough resemblance to Lalor's well-known *Cyclopedia of Political Science, Political Economy and of the Political History of the United States* to invite comparison, as to scope, methods and substance.

The field of the new work is distinctly narrower than that of the earlier publication. While the term "government" is used in a comprehensive sense so as to include a good deal of political economy and political history, as well as political science, the historical and economic discussion is more limited. Articles on such topics as economic theory as capital, competition, consumption and credit, fully treated in Lalor's volumes, are reduced to a brief notice or omitted entirely; and in the field of applied economics, such subjects as banking, corn laws, public debt and insurance are given much less space. Even political theory receives less attention, as in such articles as those on aristocracy, democracy, despotism and political duty.

It is also to be expected that a cyclopedia of *American* government will give comparatively little attention to foreign countries and to the political institutions and problems of such countries. Thus where Lalor's work has six pages on Algeria, four on Argentine, thirteen on Austria-Hungary, three on Chili, twelve on China, nine on Denmark, twenty-four on France, thirty each on the German empire and Great Britain, and twenty on Italy, the work under review has only fifteen pages on all of these countries combined. Indeed the discussion of foreign countries is largely confined to their diplomatic relations with the United States. Some attention is given to the federal systems of Germany and Canada, but Australia and South Africa receive but brief mention. So, too, little or no space is given to such topics as academies, church and state, concordat, coups d'état, credit fancier, feudal systems, Hanseatic League and the Holy Roman empire, all of which receive extended treatment in Lalor.

With the narrower scope of the field covered, it is not surprising that the number of pages is somewhat less in the new work. Indeed it would be still smaller, were not the omissions to a large extent made up by the more intensive treatment of the more limited field. Not only are the articles on the same or similar topics entirely rewritten and expanded, with recognition of the changes of the past thirty years, but there are large numbers of articles on topics barely mentioned, or not mentioned at all, in Lalor's volumes.

Special attention may be called to some of the most important of this new material, as indicating to some extent the growth and the

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changed emphasis in the scientific study of government and political problems in the United States, during the three decades since Lalor's volumes were published

Much more space is given to topics in international law, diplomacy and colonization; in constitutional law and pub ic administration; in national, state, county and municipal government; and also to such matters as the internal organization and procedure of legislative bodies, to party organization and political methods, and to the newer governmental services for the economic and social welfare of the public.

Thus may be noted treatise articles on arbitration and peace, diplomacy and colonization, as well as several articles under the caption of international law and articles on the diplomatic relations of the United States with foreign countries.

Articles on constitutions and constitutional conventions and on due process of law and a number of the leading cases discuss the general problems of constitution making and constitutional law. Other articles deal with the suffrage and elections; with state legislatures and legislative committees; with the president, state governors, and executive and administrative organization; and with the national and state judiciary. One group of new articles includes those on the cabinet and on each of the executive departments in the United States government. Local government is treated at length, under such topics as county government, municipal government, commission government, towns and townships and local officials. There are also articles on each of the States and on a number of the larger cities.

The influence of political parties and extra-legal political methods in elections and in the actual conduct of government are also given attention, as well as the legislation in recent years to control parties and nomination methods and to prevent political corruption.

Governmental functions and activities also receive extensive notice. Public finance is treated under the heads of taxation, expenditures and debt, and a host of minor topics. Mil tary forces are noted, rather briefly, under armies, navies, militia, etc. There are articles on police, and on the manifold regulatory functions of modern government in relation to commerce, industry and labor; and also on public works, public education, and other public undertakings for the general industrial and social welfare.

Considerable attention is given to physiographical elements and boundary questions; and personal factors in government are noted in some two hundred brief biographical articles, and by lists of the heads of executive departments in the President's cabinet.

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Another characteristic of the new cyclopedia is that it is distinctly American in its authorship. In Lalor's work a large proportion of the articles were by well-known writers in the various countries of Europe. In the present work there is only one foreign contributor. About two-thirds of the nearly 250 writers are teachers by profession; and the others have had practical experience in the public service or in public affairs. Such a body of competent writers on governmental subjects could hardly have been found in this country in the early eighties. The list includes most of the well-known university instructors in political science, and a number of those in related fields. Among the more important of those who have contributed to a considerable extent there may be mentioned—in addition to the editors—Profs. Davis R. Dewey, W. W. Willoughby, James W. Garner, William A. MacDonald, G. G. Wilson, Jesse Macy, W. B. Munro, and Judge Emlin McClain.

In the method of treatment, the new work follows the practices of American cyclopedias rather than that of the *Encyclopaedia Britannica*. In place of comprehensive discussions of leading subjects, each main subject is presented in a number of different articles, with a large number of shorter notes on specific topics and terms. Few of the 300 so-called treatise articles cover more than four or five pages; while much the larger part of the 3000 topics range from a column down to a brief description in a few lines. The longer articles are usually sub-divided into sections, with sub-headings in bold faced type.

This method makes the cyclopedia of special value to those seeking for information in short compass on specific topics. For such readers, it is made more serviceable by an index containing some 15,000 references. The more serious student of important subjects is aided by the frequent use of cross references, as well as by brief bibliographical references appended to many of the articles.

The only illustrations are a considerable number of maps and charts. The maps are mainly to illustrate boundary questions and annexations of territory. The most important charts are those showing the internal organization of the executive department of the United States government.

In their general plan, the editors have shown decided originality; and in working out its details, the work gives evidence of tireless industry. Their problems were in many respects new; and it would not be difficult to urge objections to some of the results. But critics would probably disagree as much between themselves as with the editors.

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The writer of this review would have preferred to combine several articles on different phases of one subject, with appropriate sub-headings; and would also wish to reduce the number of minor items, leaving the reader to consult the index for definitions and many of the briefer descriptions, which under the method followed involve considerable repetition.

More definite objection may be made to the lack of consistency in the form of titles for similar topics. Most of the articles on the judiciary are to be found under the heading courts, followed by qualifying words, such as federal, county, juvenile, etc. But the state courts are discussed under the heading judiciary, state. There is an article on constitutional conventions; but the convention which framed the Constitution of the United States is discussed under the heading federal convention; and nominating conventions are described under the caption convention, political. There is one article on co-education and another on education of women. One article deals with the cost of government; while others on the same subject, are entitled expenditures, federal and expenditures, state and local. Colonial charters are classified under the adjective; while municipal charters are described under the heading charters, municipal. More uniformity in this matter was to be expected.

To appraise the merits of the 3000 different articles would require a critical analysis of the work of the several authors, and in some cases would call for discrimination between different articles by the same author. A uniform standard of excellence could hardly be expected. Articles by such men as President Goodnow, and Profs. John Bassett Moore, Davis R. Dewey and W. W. Willoughby carry the authority of the writers; and much of the work of other and younger men is distinctly well done. But some of the writers have written a large number of articles on a wide range of topics, on which no one person could be equally well qualified.

On matters of opinion, the editors have wisely avoided trying to reconcile the views of the different authors who might discuss the same topic in different articles. Indeed the appearance at times of two or more articles by different writers on closely related branches of the same subject indicates a purpose to present varying points of view on controverted questions, which adds rather than detracts from the value of the cyclopedia.

On the whole this work will be of great value not only to the general reader, but also to students and teachers of government and to those

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actively engaged in the work of government in this country. It is not likely to be replaced for many years.

JOHN A. FAIRLIE.

The Natural History of the State: An Introduction to Political Science. By HENRY JONES FORD. (Princeton University Press, 1915. Pp. i–viii, 1–188).

This work by Professor Ford is an elaboration of the point of view presented in his paper read in 1905 before the Baltimore meeting of the American Political Science Association. This same point of view, coupled with an attack on "The Pretensions of Sociology," later brought about a lively controversy between him and three prominent sociologists.[1]

The main thought of this little volume is simple enough, since it argues that the "State in its primordial form" existed as an "undivided [undifferentiated] commune," which "antedates the differentiation of Man from the antecedent animal stock." By stressing such pre-human and the later primitive human groupings, Professor Ford argues for a *social* as against an *individual* evolution, so that "the Individual is not an original but is a derivative." "Man did not make the State; the State made Man. Man is born a political being. His nature was formed by government, requires government and seeks government." From this standpoint Professor Ford thinks that there is need of a reinterpretation of political theories in respect to the state, government, and private rights.

Obviously the oddity of the argument consists in calling the pre-human "undivided commune" a form of the state. It is questionable whether other political scientists would endorse that point of view, though most would agree that the historical beginnings of the state may be traced in the rude institutions of such groups discussed, as, for example, those of the Australian blacks—presumably a comparatively modern development by contrast with a pre-human commune of the Tertiary period. According to the author's viewpoint the state came first and is all-inclusive, so that society is merely "the State viewed in its distributive aspect." The usual view, of course, is that certain aspects of social life have become differentiated or specialized into the political institution known as the state. If the author's argument is

[1] See *American Journal of Sociology*, Vol. xv, 1909–1910, pp. 1–15, 96–110, 244–259, 672–680.

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correctly understood, the presence of any sort of governmental organization and authority implies the existence of a state. In other words, all forms of social control are governmental, and under the "genus" state should presumably be classed such species as a family, a church, a university, or a trade union, judging from the definition of state given on page 174.

As a whole, the book may be said to be an excellent summary of the argument for a social origin of society, as against the obsolete individualism of the social contract theory, but it fails to prove that the *state* had a pre-human origin or to give a satisfactory notion of what the author means by state, government, and sovereignty.

J. Q. Dealey.

The Formal Bases of Law. By Giorgio del Vecchio. Translated by John Lisle. Modern Legal Philosophy Series, Vol X. (Boston: The Boston Book Co., 1914. Pp. lvii, 418.)

This volume consists of translations of three distinct books by Professor del Vecchio which, however, form a fairly coherent unity.

The first of these books, *Philosophical Presuppositions of the Idea of Law*, is really an essay in epistemology in which the Kantian analysis of knowledge is applied to the idea of law. Though hostile to dogmatic or Hegelian idealism, it is mainly devoted to an attack on historicism or empiricism as a philosophy of law. The question, what is law, cannot be answered by history because history shows us only the changing content. The enduring form or essence can be grasped only a priori by pure reason. What precisely this form or essence of law is, is not clearly indicated in this book, but a sharp distinction is drawn between the form or concept and the ideal of the law. The latter deals with what the law ought to be, and is the essence of the old natural law theories, but not of a definition of what the law is.

The detailed development of the concept of law is attempted in the second book. (1) The object of law is human action, not merely as external muscular motions but as the expressions of human will. Even when not externally expressed, human action or volition is the subject of rights, e.g., the right to freedom of conscience, etc. (2) The principle of law is not force, economic or other utility, but ethical, so that there can be no real conflict between law and morality. (3) All law is imperative, (4) regulates rights, i.e., duties and claims, and (5) is necessarily coercive. Though the general principle, that law must be de-

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fined by its end, is rejected, the concluding formal definition of law comes perilously near it, thus: "Law is the objective coördination of possible acts among men, according to an ethical principle which determines them and prevents their interference" (p. 218).

The metaphysical basis of this definition is developed in the third book, *The Concept of Nature and the Principle of Law.* The old natural law was not sufficiently metaphysical. It tried to evaluate law on the basis of human nature as it appeared in a [supposed] moment of time or on a basis of empirical psychology. The true basis of natural law and of the evolution of positive law is to be found in human nature "absolutely considered" (p. 317). This absolute human nature is developed, in conformity with the Kantian distinction between the phenomenal and the noumenal self, the primacy of the ego, etc. According to this view the ideal nature does not depend upon its being embodied in empirical nature, since the former is the very condition of the latter becoming an object of possible knowledge. Professor del Vecchio, however, believes in progress, i.e., that there is in the empirical world an actual constant approximation to this ideal. Hence the ideal state of nature is pictured as actual not in some remote past but rather in some remote future.

Professor del Vecchio is today one of the most distinguished European teachers of the philosophy of law. He has a thorough command of the literature of his subject, and his criticism of the regnant continental positivism is acute and penetrating. But specializing in the philosophy of law exposes one to objections from both philosophers and lawyers. It is true that the essence of law is not grasped by a purely historical treatment, but from this it does not follow that an a priori handling of the concept of law is a safe method of getting insight in this field. It is true that conceptual analysis plays a greater part in law than in almost any other science, but del Vecchio does not take account of the formidable movement of protest among jurists against the mischief of this formalism or *Begriffsjurisprudenz.* This movement deserves all the more respect because it is in line with the tendency of all modern science, including mathematics. Indeed, our author's own analysis of the concept of law shows how many things can escape the deductive net. Thus he holds it as self-evident that law must deal with will-acts, but the laws of a civilized country hold me responsible for the acts of my servant done contrary to my orders, or entitles me to inherit the goods of my uncle, though the latter's living and dying as my uncle was not due to any act of mine. According to del Vecchio's

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analysis law is always determined by some ethical principle. But not only does the consciousness of mankind testify to the existence of iniquitous laws but a great deal of law, like the rule of the road, is not directly concerned with ethics at all. In the development of the law of a subject like mortgages, the jurist finds that consideration of justice will not carry him very far. Most of it depends on technical rules, the logic of analogy, etc. The real danger in the method of conceptual analysis consists in the separation of law from the context of life and treating it as if it had a separate existence. In point of fact, however, law always presupposes that people are moved by certain motives, and endeavors to control or modify these results by artificial weights or sanctions in the form of civil or criminal liability. The conceptual treatment of legal rules is thus likely to miss the fact that these rules are not substantives but adjectives of substantive social rules. The unintelligible character of law apart from the conditions of life to which it applies, is seen clearly when we study a foreign system like the Roman or Hindoo law.

The confusion between law as it is and law as it ought to be is facilitated in Europe by the fact that the word for *right* and *law* is the same (*diritto, droit, recht*). Our author is also influenced in this respect by his adherence to Kant who habitually confused existence and validity. This is seen in such expressions as "the ontologic priority of the concept," or that historical progress is a "dictate of reason" (pp. 106, 328). The question whether there has actually been more progress than degeneration is one of the weight of material evidence of fact and not to be settled by dictates of reason.[1]

All of the advanced sciences are today outgrowing the juvenile fear of metaphysics, and del Vecchio renders a real service in pointing out that formal study only renders clear what otherwise we would only assume unconsciously (p. 116). This, however, does not necessitate the assumption of the whole Kantian metaphysical machinery. The principle that no human being should be treated merely as a means is, within certain limits, valuable but does not really depend on the notion of the absolute ego or freedom. The only use del Vecchio makes of this principle of absolute freedom is to condemn slavery absolutely. But this as Kohler has shown is not at all a closed question. It certainly is not when we ask what is slavery?

[1] The study of history may at least save us from unfounded historical generalizations, e.g., the dogma which Del Vecchio accepts from Maine to the effect that all progress is from status to contract.

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This review does not pretend to do justice to the many brilliant ideas and suggestions that fill this volume. But if books like del Vecchio's are to aid us in getting rid of the old eighteenth century natural law and finding some tenable rational criterion for the evaluation of our law, the limitation of the Kantian formalism must be emphasized.

The work of translation is of a high order, but is marred by a certain disregard for the accepted terminology of philosophy, as in the use of such terms as *methodic, phenomenic,* or *consequent* for *consistent.* The proof reading of foreign quotations shows a number of slips.

MORRIS RAPHAEL COHEN.

Societal Evolution. By ALBERT GALLOWAY KELLER. (New York: The Macmillan Company. Pp. ix + 338.)

Professor Keller holds that "the Darwinian factors of variation, selection, transmission and adaptation are active in the life of societies as in that of organisms." *Societal Evolution* is an argument in support of this thesis. The exposition is admitted to be tentative and the subject is so difficult that judgment as to the value of results of this treatment may well be suspended. The analogies pointed out may have and probably do have a basis in reality, but this relation does not seem to be sufficiently definite and secure to warrant positive conclusions. The present reviewer is far from regarding efforts to establish that relation as futile, but whether the line of approach pursued by Professor Keller is valid appears to be still an open question. The term "Societal Evolution" is sound and valuable because it makes clear that the subject is the evolution of society and its institutions and not of a series of individuals. The term points directly to *societas* and not merely to *socii.* The distinction is so important that the term deserves to be accepted by all those who hold that in the human species selective process acts directly on society and but indirectly on the individual as a member of society. But when Professor Keller goes on to argue that societal evolution is antagonistic to natural selection and that it may even issue in counterselection, confusion sets in. Although Darwin did not use the term he distinctly recognized societal evolution as a phase of natural selection—as, for instance, in the case of the social insects. The fact that through specialized function some members of the insect community have become unfit to fend for themselves is not evidence of conflict between societal evolution and natural selection, but merely that when natural selection as-

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sumes a societal phase different standards of fitness intervene. Because a scholar is not so well fitted to extract subsistence directly from nature as an Australian Blackfellow it does not follow that the scholar's disability is evidence of counterselection. But that seems to be Professor Keller's conclusion, for he says that "the whole trend of civilization is to interpose barriers to the action of natural selection." This impresses a narrower meaning on the term than is sanctioned by Darwinism, for according to it all that civilization can do is to modify the conditions under which natural selection operates with corresponding modification of results. Natural selection continues just as gravitation continues whether one roosts in a tree top or sleeps in a bed, but the consequences if one falls out will be different.

HENRY JONES FORD.

Applied City Government. By HERMAN G. JAMES. (New York: Harper and Bros. Pp. ix + 106.)

This treatise gives practical suggestions and expository instances on the principles and practice of city charter making. The suggestions are in the main judicious but in some important features Professor James does not make sufficient allowance for effect of environment. For instance, he advocates the abolition of primary elections in municipal politics and proposes that any qualified voter who so desires be allowed to enter his name on the official ballot. He holds that this unrestricted privilege would not cause a multiplicity of candidates because such facility of nomination practically exists in England and yet candidates are few. True, but in England the expense of providing the ballot is not borne by the community but is collected from the candidates, and—more important still—nominations are made only for representative office to which no compensation is attached. All that municipal candidates can contend for is the privilege of serving the community at one's own expense. Such conditions restrict the number of candidates and such conditions would have to be reproduced in this country to secure a similar result. Professor James proposes to approximate such conditions by confining elections to the choice of unsalaried commissioners who shall elect at large for an indefinite term a mayor or city manager who shall conduct the administration. But even with such sound conditions established in municipal government, there would still be encountered the corrupting influence of county and state politics. Tammany Hall subsists more

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on county offices than on strictly municipal offices, and even under a good city charter would make its pernicious activity felt. The problems of local government can not be isolated from the genera organization of public authority, and until both county and state government are organized on sound principles, attempts to purify municipal government can not be more than partially successful. So far as a topical treatment of the municipal problem can go, the recommendations of Professor James are well conceived.

HENRY JONES FORD.

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Commercial Laws of England, Scotland, Germany and France, by Archibald J. Wolfe . . . in collaboration with Edwin M. Borchard . . . 1915. 127 p. 8°. Special Agents' Series No. 97. *Dept. of Commerce, Bureau of Foreign and Domestic Commerce.*

Commission on Industrial Relations. Final report . . . 1915. 448 p. 8°.

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Report on the Colorado Strike, by Geo. P. West. 1915. 189 p. 8°.

The National Erectors' Association and the International Association of Bridge and Structural Ironworkers. By Luke Grant. 1915. 192 p. 8°.

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Pt. 2. National and state indebtedness and funds and investments: 1870–1913.
Pt. 3. County and municipal indebtedness: 1913, 1902, and 1890; and sinking fund assets: 1913.
Pt. 4. Taxation and revenue systems of state and local government, 1912. Pt. 5. Assessed valuation of property and amounts and rates of levy, 1860–1912.

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Contains: Pt. 6. National and state revenue and expenditures, 1913 and 1903, and public properties of States 1913.
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